SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 496

AMALGAMATED TRANSIT UNION, AFL-CIO, *Appellant*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees,*

and

AMERICAN BUSLINES, INC., and NATIONAL ASSOCIATION OF MOTOR BUS OWNERS, *Intervenor-Appellees.*

On Appeal From The United States District Court For the District of Columbia

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States District Court for the District of Columbia, entered on May 4, 1966, which affirmed an order of the Interstate Commerce Commission, and submits this Statement to show that the Supreme Court of the

United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the court below is reported at 253 F. Supp. 481, and it may be found as Appendix A attached hereto. The two opinions of the Interstate Commerce Commission involved herein are reported at 90 M.C.C. 173 (1962), and 97 M.C.C. 426 (1964), the latter of which is attached hereto as Appendix B.

JURISDICTION

This suit was brought under 28 U.S.C.A. Sections 1336, 1398, 2321-2325, and 2284, to set aside and vacate an order of the Interstate Commerce Commission. The judgment of the three-judge District Court was entered on May 4, 1966, and the notice of appeal was filed in that court on June 30, 1966. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C.A. Section 1253. The following decisions sustain the jurisdiction of this Court to review the judgment of the District Court: *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169 (1961); *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142 (1950); *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U.S. 373 (1943); and *United States* v. *Lowden*, 308 U.S. 225 (1939).

STATUTES INVOLVED

The statutory provisions involved in this appeal are Sections 5(2)(b), (c) and (f) of the Interstate Commerce Act, 49 U.S.C.A. Sections 5(2)(b), (c), and (f). The provisions are attached hereto as Appendix C.

QUESTIONS PRESENTED

(1) Did the court below err in upholding the Commission's interpretation of Section 5(2)(c) of the Interstate Commerce Act, which interpretation denies to motor carrier employees adversely affected by a Section 5 transaction protective conditions that have regularly been considered as necessary to the fair and equitable treatment of the interests of railroad employees suffering the identical adverse effects?

(2) Did the court below err in failing to conclude that Section 5(2)(c) of the Act, as interpreted and applied by the Commission in this case violates the Due Process Clause of the Fifth Amendment of the Constitution of the United States and is unconstitutional, for the reason that the Section arbitrarily and capriciously classifies motor carrier employees, and effects invidious discrimination against them in the protection afforded against losses incurred as a result of the transfer of motor carrier operating rights under Section 5 of the Act?

(3) Does the decision and judgment of the court below violate the Due Process Clause of the Fifth Amendment of the Constitution of the United States in that the decision and judgment is void of any findings based upon evidence of record, and that the decision and judgment is instead premised on matters *de hors* the record which were never presented to the Commission, were not relied upon by the Commission and which Appellant was not afforded the opportunity to meet, rebut or answer?

(4) Did the court below err in failing to conclude that the Commission arbitrarily and capriciously relied upon the same ground previously relied upon and deter-

mined adversely to it by a three-judge District Court in a prior appeal, to deny protective conditions against the loss of wages and reduction in earnings suffered by the employees?

(5) Did the court below err in failing to conclude that the Commission's findings against the need for comprehensive employee protective conditions were without any basis in the record, arbitrary and capricious, and contrary to law?

STATEMENT OF THE CASE

Introduction

This case involves a denial by the Interstate Commerce Commission of employee protective conditions in a motor carrier transfer proceeding under Section 5(2) of the Interstate Commerce Act, 49 U.S.C.A. sec. 5(2). Appellant Amalgamated Transit Union, AFL-CIO (sometimes referred to hereinafter as "Amalgamated"), as the bargaining representative of the bus drivers affected, sought from the Commission the same measure of protection for the employees as the Commission has customarily afforded railroad employees adversely affected in the same ways. The Commission has refused to grant the protection requested. Because of this refusal the employees have suffered losses in wages, reduction in earnings, additional moving costs and living expenses, and other burdens, against which they are unprotected.

The Transfer Proceeding Before The Commission

This case began on November 18, 1958, when American Buslines, Inc., made application to the Commission for approval under Section 5(2) of the Act to sell and

transfer certain of its operating rights to two other carriers, Midwest Buslines, Inc., and Continental Tennessee Lines, Inc. Amalgamated, on behalf of the bus drivers represented on American, intervened in the Commission proceedings under authority of Section 17(11) of the Act, 49 U.S.C.A. sec. 17(11). Amalgamated argued, *inter alia,* that if the application were approved, the Commission should impose, as a condition to the approval of the transfer, certain provisions for the protection of the employees whose jobs were being transferred to the other carriers, including provisions protecting them from loss of earnings resulting from displacement, monthly allowances for dismissed employees, and severance allowances, all in accordance with the Commission's regular practice in railroad cases under Section 5.

After hearings were held on the application, first a Hearing Examiner and then the Commission on November 12, 1959, granted the application but denied the specific protective conditions requested by Amalgamated. Instead, a three year "reservation of jurisdiction" was imposed by the Commission in order to give Amalgamated the opportunity to establish subsequently that the bus drivers had suffered adversly from the approved transaction. See 80 M.C.C. 681 (1959).[1]

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[1] At the time of the hearing before the Hearing Examiner, the American drivers were on strike against American. Thus, it could not be readily determined what adverse effects they would suffer if and when they returned to work with American after the sale of the routes. The Commission has commonly imposed similar "reservations" in motor carrier cases, and until 1946, the Commission had also done so in railroad cases. See *Chicago & Northwestern Railway Merger,* 261 I.C.C. 672, 675 (1946).

Amalgamated's Petition To Reopen The Record and Commission Hearings Thereon

On April 11, 1960 Amalgamated requested that the Commission reopen the record, that further hearings be held and that specific conditions be imposed for the protection of the employees. This petition was granted by the Commission and in January, 1961, hearings were held.

At the hearings before the Commission, Amalgamated's proof established the following facts concerning the adverse effects suffered by the American bus drivers:

Prior to the sale and transfer of American's operating rights to Midwest and Continental, American had employed 41 drivers on the routes at issue. With the sale consummated, and 41 fewer jobs available with American, 22 drivers who had lost their jobs exercised their master seniority with American and obtained new assignments elsewhere on American. In so doing, these 22 drivers displaced or "bumped" other less senior drivers who, in turn, "bumped" other junior drivers into new assignments. Amalgamated introduced into evidence before the Commission eleven exhibits depicting the earnings of drivers both before and after displacement, in order to illustrate the losses in earnings sustained. These statistical comparisons showed that the drivers, in many months after being displaced and after locating new assignments, earned substantially less than their average monthly earnings had been before displacement.

Many of the drivers affected had been employed by American in what was known as the "southern senior-

ity district", which was completely eliminated with the sale of the routes involved. Each of these drivers lost his employment in that district and had to move to American's "eastern seniority district" to remain employed. For some of these drivers, the first assignments available in the eastern district were lower-paying and irregular extra-board work. For others, even the availability of regular assignments did not assure equivalent earnings, and they earned less in many months than they had averaged before.

Of the 22 drivers, others had been employed in American's "central seniority district" prior to the sale. Because some assignments still existed in this district after the sale, and because they still had a home seniority district in which to bid, these drivers were restricted in securing assignments in the eastern district. Before these drivers could bid into the eastern district, they had to be in furlough status in the central district. Then if, once having secured an assignment in the eastern district, a job reopened in the central district which they were eligible to bid, the drivers had to return to the central district or forfeit all seniority rights.

Many of the central drivers did acquire furlough status and bid into the eastern district in search of better paying, more secure work. However, soon thereafter, jobs again reopened in the central district and they were forced to return. Amalgamated's evidence showed the results of these moves: for example, in one case the driver earned after the sale of the routes what he had averaged before in only three of the twelve months analyzed. For another, in only two of the twelve months studied was the driver able to earn what he had averaged before and, in one of those months, he

had to drive more than 4,000 more miles than he had previously averaged in order to achieve the higher earning level.

Testimony from the drivers themselves was also proffered by Amalgamated. Mr. Elmore's testimony may be cited as illustrative. Before the sale of his route, Mr. Elmore held down a regular run in the central district. He and his wife lived in a home they rented in Springfield, Missouri. When Mr. Elmore returned to work following the sale, he was unable to hold an assignment because he was continually "bumped" by more senior drivers. Finally he was furloughed in the central district and, in November, 1959, he was able to bid into the eastern district on a regular run. He worked in the eastern district until the end of June, 1960, when he was recalled to the central district where he had to take an extra-board assignment in Big Springs, Texas.

Mr. Elmore testified that for the first two months of his employment in the eastern district, his wife remained in Springfield, Missouri, because he was uncertain of the duration of his eastern district assignment. During these two months, he shared a hotel room in Pittsburgh, Pa. with several other displaced drivers. Subsequently, Mr. Elmore's wife joined him and they rented an apartment in Pittsburgh. Then, when he was recalled to the central district, he and his wife moved to an apartment in Big Springs, Texas, giving up their home in Springfield. Mr. Elmore's total wage loss for this period was $243.49. This does not include the $112.05 in wages lost while moving from Pittsburgh to Big Springs. His new accommodations cost him $12.50 more per month than he had paid in Springfield. He also incurred expenses in moving

his wife and household furnishings to the different locations.

Amalgamated, in presenting its evidence of adverse effects, did so on the theory that under Section 5(2) of the Act, motor carrier employees are entitled to the same measure of protection as the Commission has held to be "fair and equitable" for railroad employees under similar adverse circumstances. Accordingly, Amalgamated had tailored its proof to the Commission to demonstrate the likenesses between the losses in earnings, moving expenses and additional living costs incurred by motor carrier employees, and those incurred by railroad employees in similar Section 5 cases. Amalgamated proceeded on the assumption that if the needs of the two classes of employees are indistinguishable, and unless good cause can be presented for treating each class differently, then no reason appears for imposing in motor carrier cases conditions less protective than those ordinarily imposed in railroad cases.

Amalgamated's Proposed Conditions and The Commission's Denial Thereof

At the close of the hearings before the Commission, briefs were submitted by the several parties. In its brief Amalgamated set forth in detail the conditions it proposed to protect against the adverse effects sustained by the employees as established in the record.

(1). For employees who retained employment status but who were displaced from their former jobs, a monthly "displacement allowance" was to be paid if their actual monthly earnings in the new job were below the average earnings in the old job;

(2) For dismissed employees, those who lost their jobs entirely, either a monthly "dismissal allowance," equal to the displacement allowance, or a lump sum "separation allowance" based upon length of service would be paid;

(3) Protective conditions insuring against losses sustained in the sale of real estate, broken leases, and for reimbursement of moving and other expenses; and

(4) arbitration procedures to resolve disputes arising out of the application of other protective conditions.[2]

In May, 1961, a Hearing Examiner rejected the Amalgamated's request for a specific set of employee protective conditions. The Examiner found that drivers had in fact suffered adverse effects but he held that these adverse effects were not those against which the Commission, under "the established policy in motor bus cases," had provided protection. On appeal to the Commission, the Commission in March, 1962, affirmed the Examiner's Report. See 90 M.C.C. 173.

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[2] Amalgamated's specific formula of protective conditions was based on three sets of railroad conditions: (1) the Washington Agreement of 1936, see *United States* v. *Lowden*, 308 U.S. 225 (1939); *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 173 (1961); (2) the "Oklahoma Formula," see *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177, 179 (1944); and (3) the "Burlington Conditions," see *Chicago, Burlington and Quincy Ry. Co. Abandonment*, 257 I.C.C. 700, 704 (1944).

Amalgamated's proposed conditions appear at 90 M.C.C. at 188-192 (1962). An analytical comparison between these conditions, and the railroad conditions from which they were derived, appears at pp. 38-46 of Amalgamated's Brief to the Hearing Examiner, February 27, 1961, which brief is a part of the original record before this Court.

Judicial Review of Commission's Decision and Remand to the Commission

Thereafter, Amalgamated brought suit to set aside and vacate the order of the Commission to the extent that protective conditions were denied to the drivers adversely affected. By order and judgment dated August 2, 1963, a unanimous three-judge District Court for the District of Columbia set aside the Commission's order, and remanded the case for further proceedings. *Amalgamated Association* v. *United States,* 221 F. Supp. 958.

In the order vacated by the Court, the Commission had relied upon three separate and independent grounds, including a finding that the drivers had refused to avail themselves of alternative employment with American after the sale, and had, therefore, brought the injuries upon themselves as a matter of their own free "choice." 90 M.C.C. at 187. However, on appeal, the Court disagreed, and held "the grounds on which the Commission relied in denying relief were accordingly erroneous." 221 F. Supp. at 961. With respect to Amalgamated's claim that motor carrier employees are entitled to the same measure of protection as railroad employees, the Court held:

> "But we think that if any particular measure of relief is one which would ordinarily be granted to railroad workers similarly situated, the Commission should not deny it to the employees of American Buslines, Inc., without a reasoned explanation of its denial, consistent with what has here been said." 221 F. Supp. at 961.

Upon remand, the Commission reopened the matter "for reconsideration on the record as made." No further hearings were held, and no additional testi-

mony was taken or evidence received. On August 17, 1964, the Commission rendered its decision which is reported at 97 M.C.C. 426, and is set forth in Appendix B, *infra*.

In this latest decision, the Commission again refused to condition its order upon the conditions proposed by Amalgamated. Because of the Commission's treatment of the case at this point, the issues may be divided into three separate categories.

First, for the drivers who had to accept poorer paying and irregular assignments elsewhere with American, the Commission made no provision whatever for their losses in earnings. This was because, the Commission held, "the lesser wages . . . resulted from their own choice not to accept employment paying more than they were then earning" with American. 97 M.C.C. at 439. This is precisely the same ground relied upon previously by the Commission, and one of the reasons rejected by the Court as inadequate and erroneous in the first appeal.

Second, for the less senior drivers who had been "bumped" by one of the 22 other drivers, the Commission found it "unnecessary and inappropriate to provide benefits to them" because "the adverse effect, if any, seems impossible to ascertain, minor in extent and difficult to attribute to this transaction." 97 M.C.C. at 441 n. 6.

Third, the only protective condition imposed by the Commission was one providing "a lump-sum payment approximately equal to the cost incurred in moving their households." This proviso was drastically limited in that it was effective for only one year, and because it contained no provision for losses sustained in the sale of real estate, or for additional costs in the forced termination of leases.

The Judgment from Which This Appeal Is Taken

Both American and Amalgamated sued to set aside and vacate the Commission's latest order, with American and the National Association of Motor Bus Owners being granted leave to intervene in Amalgamated's suit. Amalgamated's basic claim was that the drivers were entitled to the same measure of protection railroad employees would have received under the same circumstances, and that the Commission had flouted the Court's directive by failing to give a "reasoned explanation" why motor carrier employees were not granted this relief. Amalgamated's brief to the court established how the Commission's order deviated from the course which would have been followed in a railroad case, and that the protection which was granted was substantially less than that accorded railroad employees similarly situated. Amalgamated also showed that the Commission had, with respect to the first category, reiterated a ground relied upon previously and rejected, and that the Commission's findings not only lacked support in the record, but were contrary to the record and based on matters *de hors* the record.

A three-judge Court affirmed the order of the Commission on employee protection.[3] The Court held that the standard of what is "fair and equitable" for motor carrier employees is not to be found in what is fair

[3] After the American and Amalgamated suits had been filed, the International Brotherhood of Teamsters filed an action against the Commission, C.A. 894-65, in the same court, and raised issues concerning the protection accorded truck drivers adversely affected by transfer proceedings under Section 5 of the Act similar to those raised herein. That action was consolidated with the other two suits, and the single opinion rendered by the court covers all three suits. We are advised by counsel that an appeal has been taken in that action also and that a Jurisdictional Statement will be filed by the IBT in this Court presently.

and equitable for railroad employees, that the Commission is not required under Section 5 of the Act to follow the railroad conditions as a guide to the protection given motor carrier employees, and that the Commission's policy of distinguishing between the two classes of employees is supported by a rational basis. In an effort to support these conclusions, the Court found that the needs of motor carrier employees are not as great or as pressing as those of railroad employees, and therefore less protection for bus drivers is permissible. It is from this decision and judgment of the court below that this appeal is taken.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Introd ction

The primary issue in this case is one which goes to the basic philosophy behind the Interstate Commerce Act of even-handed regulation of competing modes of transportation. That issue is whether the Commission under Section 5 of the Act may be permitted to deny protective conditions to motor carrier employees under circumstances that would not have warranted denial of the same measure of protection to railroad employees similarly situated. If the order of the Commission and of the Court below, to the effect that the Commission is not required to impose the same measure of protection to both classes of employees, is correct, then a serious and substantial constitutional question is presented respecting the interpretation and application of Section 5 of the Act. Section 5, as already construed by the Commission, requires "fair and equitable" treatment of both classes of employees. If what is "fair and equitable" for bus drivers is something other than, and substantially less than,

what is "fair and equitable" for locomotive engineers, then Section 5 is unconstitutional. For, as will be shown, that distinction cannot be supported by any reasonable statutory purpose.[4]

This is the first occasion for the issue of protective conditions for motor carrier employees to be before this Court. However, there is nothing episodic in the effort by the Amalgamated to gain fair, reasonable and adequate protection for the American bus drivers.

Amalgamated is the predominant union in the passenger transit industry. It represents more than a hundred thousand bus drivers and other employees in both local and inter-city transit in all parts of the United States. For example, the employees of the Greyhound Bus System, and many of the employees of the Transcontinental Bus System, the system with which American is affiliated as a wholly-owned subsidiary, are represented by Amalgamated. For many years this union has seen the members of its locals adversely affected as operating rights have been traded back and forth among motor carriers. Since 1940,

[4] The doubt surrounding this issue is compounded by the conflicting positions taken on this question in the two appeals by counsel for the Commission. On the first appeal, counsel for the Commission conceded that the Commission does not have the discretion to deny protection to motor carrier employees under circumstances in which the Commission would not have denied protection in a railroad case. Counsel argued that protection had been denied to the American drivers not because they were motor carrier employees, but because of considerations which would have warranted denial of protection to railroad employees also. In the second appeal, counsel adopted a quite different position and stated on brief to the court below that "What is fair and equitable for railroad employees . . . provides no standard for the minimum fair and equitable protection the Commission must grant to motor carrier employees."

Amalgamated has attempted to obtain from the Commission conditions attached to its orders, so that the employees could share in the benefits derived by the carriers from the transfers of operating rights, and so that these employees would not be adversely affected. Year after year the Commission has denied the relief requested.[5]

For railroad employees, the situation has been quite different. Since the 1930's, since even before the Act was amended in 1940 to specifically set forth in Section 5(2)(f) the protection deemed fair and equitable for railroad employees, see *Chicago, Rock Island & Gulf Railway Co. Trustees Lease,* 230 I.C.C. 181 (1938), *aff'd sub nom. United States* v. *Lowden,* 308 U.S. 225 (1939), railroad employees have been accorded comprehensive income protection and other protective conditions in Section 5 cases.[6] These railroad conditions were used as a pattern for Amalgamated's request to

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[5] The usual practice of the Commission in these motor carrier cases is to impose a "reservation of jurisdiction" only. See *e.g., The Greyhound Corp.—Control—Southeastern Greyhound,* 57 M.C.C. 123, 156 (1950). In *The Short Line, Inc.—Purchase—New England Transportation Co.,* 75 M.C.C. 33 (1958), and *Baggett Transportation Co.—Purchase—Hunt Freight Lines, Inc.,* 75 M.C.C. 147 (1958), the Commission granted a three-month severance allowance. In 1963, the Commission added to this severance allowance a three-month "displacement" or income protection allowance. *Indiana Motor Bus Co.—Purchase—Chicago, South Shore R.R.,*— M.C.C. —, Docket No. MC-F-8122 (1963). But, in neither the instant case, nor in the companion case, *Overnite Transportation Co.—Purchase—Rutherford Freight Lines, Inc.,* 97 M.C.C. 568 (1964), did the Commission grant a "displacement" allowance.

[6] The Commission has cited to this Court a near-hundred railroad cases in which comprehensive protective conditions have been imposed in Section 5 proceedings. See Appendix to the Brief of the United States and the Interstate Commerce Commission in *Brotherhood of Maintenance of Way Employes* v. *United States,* 366 U.S. 169 (1961).

the Commission, and it was these conditions which the Commission refused to impose in this case.

The capriciousness of the Commission's interpretation of Section 5, to deny to motor carrier employees the same measure of relief afforded railroad employees, is highlighted by a single Commission practice. In the United States, there are many bus drivers who are, because of the corporate structure of their employer, technically employed by railroad companies. Yet, these drivers are not otherwise engaged in railway labor; they drive buses for a living, or they work as bus mechanics. They are, as far as their job description is concerned, precisely like those drivers before this Court in this case. Notwithstanding these facts, and notwithstanding the identity of their employment and job function, the Commission treats these bus drivers as railroad employees and grants them railroad protective conditions. Amalgamated agrees these employees are entitled to this "fair and equitable" treatment. Obviously, they should not be treated differently simply because they drive a bus, rather than a locomotive, for a living. But, an important and substantial question of the application of Section 5, and of the continued administration of that Section by the Commission, is presented, when other bus drivers, no differently situated, are arbitrarily denied protection because they are motor carrier employees.

1. *The Statutory Requirement of a Parity of Treatment.* There can be little question that the Commission's denial of protective conditions to motor carrier employees deviates from the Congressional purpose. As originally enacted, the Interstate Commerce Act applied only to the railroad industry. In 1935, the Motor Carrier Act, 49 Stat. 543, was passed, and it became Part II of the Interstate Commerce Act in

1940. See 54 Stat. 919. The Motor Carrier Act brought the motor bus and trucking industries under the control and regulation of the Commission. Sections 212 and 213 of the Motor Carrier Act, 49 Stat. 555, conferred upon the Commission the same basic control over the transfers of motor carrier operating rights as existed under Section 5 for the railroads.

The legislative history of the Motor Carrier Act reflects clearly the Congressional intent of even-handed regulation of both forms of transportation. The Federal Coordinator of Transportation cited, as one of the primary reasons for the new legislation, the oversupply of unregulated transportation facilities in competition with the well-regulated railroad industry. His proposal was to bolster the competitive position of the railroads, whose financial position was of national concern, by regulation of the motor carrier industry on terms equal to the regulation of the railroads.[7] But, this was not to be accomplished at the expense of the employee interests: "fair treatment of labor" was to be recognized and promoted.[8] Unquestionably, this

[7] Hearings on S. 1629 Before the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess. 50 (1934). In 1928 and 1932 the Interstate Commerce Commission had made exhaustive studies of the motor carrier industry, the effect of its competition on the railroads, and the need for federal regulation. See *Motor Bus and Motor Truck Operation*, 140 I.C.C. 685 (1928); *Coordination of Motor Transportation*, 182 I.C.C. 263, 379 (1932). See also Magnuson, "The Motor Carrier Act of 1935: A Legislator Looks At The Law," 31 Geo. Wash. L. Rev. 37, 40-41 (1962).

[8] Hearings on S. 1629 Before The Senate Committee on Interstate Commerce, 74th Cong., 1st Sess. 51 (1934). See also Eastman, *Report of the Federal Coordinator of Transportation, 1934*, H. R. Doc. No. 89, 74th Cong., 1st Sess. 8 (1935). This Report, and the statement of objective set forth therein, is also referred to in the Senate report accompanying favorable action on the Eastman bill, S. Rep. No. 482, 74th Cong. 1st Sess. 3 (1935).

conclusion was based in part upon the Commission's own findings that unrestrained and unregulated motor carrier competition had the "tendency to break down wages and conditions of employment."[9] Representatives of labor likewise testified on the need for stabilized working conditions in the motor carrier industry, and in favor of a parity of treatment for both industries, so as to avoid continuation of the unfair competitive advantage held by the motor carriers.[10]

Through the years the Commission has, at best, paid scant attention to this legislative history. On the one hand, the Commission has stated, "the Act, taken as a whole, makes clear the congressional intent that public policy demands fair and equitable treatment of employees of motor carriers." *Short Line, Inc.—Purchase—New England Transp. Co.*, 77 M.C.C. 33, 37 (1958). And, in the first order in the instant case, the Commission held that its refusal to act "should not be construed as opposing in all instances" the imposition of railroad conditions for the protection of motor carrier employees. 90 M.C.C. at 188.[11] However, on the other hand, as the Commission itself concedes, "In no instance . . . has the Commission imposed such conditions where only motor carrier employees were involved," *Ibid.*, and the Commission will not impose such conditions "unless compelling reasons so dictate." 97 M.C.C. at 440. This is, it is

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[9] *Coordination of Motor Transportation*, 182 I.C.C. at 383.

[10] Hearings on S. 1629 Before the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess. 417, 423, 476, 542 (1934).

[11] Eleven years earlier, in *Hudson Bus Lines—Control—Boston & Maine Transportation Co.*, 58 M.C.C. 133, 135 (1951), the Commission stated that the parties to a motor carrier case should use the railroad conditions "as their guide" in reaching an agreement on employee protection.

respectfully suggested, something other than an even-handed interpretation and application of Section 5, and is wholly capricious and contrary to the statutory purpose. The correctness of this interpretation deserves this Court's attention, for maintenance of the competitive relationship between the competing modes of transportation turns in large part on this provision.

2. *The Constitutionality of Section 5.* If this Court finds no error in the Commission's interpretation and application of Section 5, which results in different standards of protection for motor carrier and railroad employees, a substantial constitutional question is presented involving the contravention of the Due Process Clause of the Fifth Amendment of the Constitution of the United States.

The Commission has historically justified its denial of protective conditions to motor carrier employees on the ground that protection for railroad employees is "mandatory" under Section 5(2)(f), whereas for motor carrier employees under Section 5(2)(c) conditions are merely "discretionary."

The answer to this is two-fold. First, as the Commission held in *Short Line, supra,* p. 19, motor carrier employees are entitled to "fair and equitable" treatment also, just as railroad employees are entitled. Furthermore, nothing appears in Section 5, or anywhere else in the Act, to support the proposition that what is "fair and equitable" for motor carrier employees is protection substantially less than that afforded railroad employees as "fair and equitable."

Second, it would appear that the "mandatory"-"discretionary" dichotomy which the Commission now reads into the Act is actually a *post hoc* rationali-

zation formulated to obscure the discrimination practiced by the Commission against motor carrier employees.[11a]

Under former Section 5(4)(b) of the Act, 48 Stat. 217, the Commission was given general authorization only to impose conditions which would "promote the public interest." Acting on this general authorization alone, the Commission granted, with the approval of the Supreme Court, see *United States* v. *Lowden,* 308 U.S. 225 (1939), protective conditions which do not differ substantially from those which Amalgamated now seeks. This general authorization remains in the Act in Section 5(2)(b). The only difference is that today the Act spells out in Sections 5(2)(c) and (f) that the "interest of the carrier employees affected" is to be given specific weight, and that "fair and equitable" conditions are to be afforded.

If the Commission was impelled in *Lowden* to provide full protection for railroad employees at a time when the only statutory authority was a general one, it is hard to accept the Commission's present rationale which completely ignores the same general authorization in 5(2)(b), and rests exclusively on the specificity of 5(2)(f). The Commission has never explained, and certainly the court below did not, why the substantial protective conditions imposed in *Lowden* to promote the public interest in 1938, are not appropriate in 1966 to promote the same public interest, under the same showing of adverse effects.

[11a] The claim that conditions, beyond the statutory minimum, are "mandatory" under Section 5(2)(f) is not accurate. What is "fair and equitable" for railroad employees is not fixed. The history of railroad conditions has been one of continual expansion on a case-by-case basis. *Cf. Seaboard Air Line R.R.—Merger—Atlantic Coast Line R.R.,* 320 I.C.C. 122, 200-205 (1963).

This Court has held that the Due Process Clause embodies the standards requisite to constitutional legislative action, and the prohibitions against invidious classification and discrimination, found in the Equal Protection Clause of the Fourteenth Amendment. *Schneider* v. *Rusk,* 377 U.S. 163, 168 (1964); *Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1954); *United States* v. *Petrillo,* 332 U.S. 1 (1947). In order to hold that Section 5 of the Interstate Commerce Act does not fall afoul of this equal protection standard, it must be determined that the distinction, which the Commission has held exists between the relief to be accorded the two groups of employees, is somehow related to the purposes served by the statute. Otherwise, Section 5 falls within the ambit of prohibited legislative action because the provision effects invidious discrimination against motor carrier employees as a class.

In the preamble to the Transportation Act of 1940, Congress declared the National Transportation Policy to include the encouragement of "fair wages and equitable working conditions." 54 Stat. 899. In Section 5(2)(b) of the Act, Congress authorized the Commission to impose "terms and conditions" which are deemed "just and reasonable," so as to mitigate the adverse effects upon employees of Section 5 transactions.

This Court has already examined the ways in which employee protection promotes the National Transportation Policy by encouraging adequate and efficient transportation service, and how employee protection helps develop, coordinate and preserve the national transportation system. See *United States* v. *Lowden,* 308 U.S. 225 (1939). To paraphrase the Court's decision is that case, unless the hardships caused to employees by Section 5 proceedings are mitigated, and

unless employees are afforded treatment which will assure high morale and which will reduce the possibility of an interruption to service by labor disputes, the Congressional scheme will necessarily falter.

The injuries sustained by the bus drivers in this case have been noted. Their losses in earnings, reduced wages, additional moving and living costs, do not differ from those suffered by railroad employees in a Section 5 proceeding. The Commission has acted to mitigate the damages of railroad employees. It has not done so for motor carrier employees. Section 5, as applied by the Commission, thus condones the placing of burdens on motor carrier employees which have been lifted from railroad employees. Nothing in the National Transportation Policy justifies this unequal protection of the law. The classification of motor carrier employees is discriminatory. This discrimination is invidious, it has no reasonable statutory basis or purpose, and it is therefore unconstitutional.

3. There is also presented in this case the substantial question of the proper standards by which Commission decisions, and appellate review of those decisions, are to be adjudged. For the fact is if the customary "substantial evidence of record" standards are used to test the validity of the Commission order and the court's affirmance of this order, the judgment of the court below must be reversed.

One of the general grounds relied upon, first by the Commission and then by the Court, to distinguish the protection required by motor carrier employees was "the expanding nature of the motor carrier industry, and the high degree of transferability of motor carrier employees within the industry." 97 M.C.C. at 440.

However, this Court may search in vain the record before the Commission for evidence probative on these critical findings. The carriers offered no evidence that the motor carrier industry is an expanding one, rather than a contracting one. And there was no evidence proffered to show that the American drivers possessed skills which were more transferable than those of railroad workers. Furthermore, the Commission's decision is barren of the requisite articulation of the relevance of these findings to the issue presented of whether the employees were entitled to protection for losses which even the Commission concedes they suffered.

It is as if the Commission took "administrative notice" of certain facts, and used these facts to determine the cause against Amalgamated. Amalgamated had no opportunity to meet, answer or rebut the claim that the motor carrier industry is an expanding one, or that the skills of bus drivers are easily transferable to other employment. Obviously, there are limits to what an agency may do in the name of administrative notice. ". . . [T]o press the doctrine . . . and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial." *Ohio Bell Telephone* v. *PUC*, 301 U.S. 292, 302 (1937). These limits have been exceeded here, and the denial of due process to Amalgamated could not be more clear.

The denial of due process to Amalgamated is also present in the court's reiteration of the same Commission findings. The court compounds the error by further stating that the needs of railroad employees are greater than those of motor carrier employees because "Displaced railroad employees meet with more difficulties in obtaining similar positions . . . ." Not even

the Commission went so far, and the court's conclusion appears to be of whole cloth.[12]

The court's treatment of the specific formula of employee protection awarded by the Commission to the American drivers, and of Amalgamated's objections thereto, is peculiar. All that the court states in reference to the American drivers specifically is:

> "The only financial loss to employees that the Commission could here attribute to the Midwest Buslines (sic) occurred with its employees who were required to change their place of residence .... The majority of the Commission has granted only such protection as the employees would have been entitled to had they followed their work, and such protection seems fair and equitable to employees of American Buslines."[13] 253 F. Supp at 484.

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[12] The court's opinion in this respect was undoubtedly based, in part at least, on certain representations made by the Government in its brief to the court which found no support in the record. The Government devoted considerable space in its brief to an examination of recent special consideration given railroad employees in other forums and by other bodies. Apparently, this was intended to justify the Commission's unequal treatment of motor carrier employees, even though the Commission itself had never alluded to this consideration as determinative. Amalgamated objected to this extra-record, *post hoc* rationalization by the Government, see *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962), but the court below nevertheless accepted these representations as fact and relied upon them.

[13] The court has apparently confused the carriers involved and the employer of the drivers adversely affected. The employees so affected were American drivers, not Midwest employees. Amalgamated was appearing on behalf of the American drivers who lost their jobs and who were compelled to take other assignments on American in order to remain employed. No "Midwest" drivers were required to change their place of residence.

This holding is vague, confusing and not responsive to what the Commission actually decided in its latest order. In the first place, the court had already held, on the previous appeal, that the American drivers were not required to "follow their work," by accepting offers of employment with Midwest and Continental, which had purchased the routes, because those offers did not include recognition of full seniority rights. 221 F. Supp. at 961. Secondly, as shown above, many American drivers did exercise their choice, when the opportunity presented itself, did bid assignments in other locales, did move their households and families, and did suffer losses, including reduced earnings, for which the Commission's protective conditions do not compensate. What the Court actually meant by this conclusion is not clear.

What the Commission did on the specific formula of employee protection was to treat separately three different issues. On none of these is the Commission's decision supported by the "substantial evidence" of record required for legitimate administrative action. See *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962); and *Interstate Commerce Commission* v. *J-T Transport Co.*, 368 U.S. 81, 93 (1961).

(a) *Displaced Drivers Who Suffered Losses In Earnings.* The ways in which the American drivers, who lost their jobs by the sale of the routes, sustained losses in earnings, and the evidence of these losses, has already been detailed, *supra*, pp. 6-9. The Commission, *in its first order*, denied protection to these employees on the basis of a finding that they failed to take advantage of better paying jobs elsewhere on American, and therefore the injuries sustained were a matter of

their own free "choice." 90 M.C.C. at 187. On appeal from this first order, the court held that all "the grounds" relied upon by the Commission "were accordingly erroneous," and reversed and remanded. 221 F. Supp. at 961. On remand, the Commission repeated, as the reason for denying protection to these displaced drivers, the same ground litigated adversely to it: "the lesser wages . . . resulted from their own choice not to accept employment paying more than they were then earning." 97 M.C.C. at 439. Patently, the court below erred in failing to apply the principles of *res judicata* on this issue, and by letting stand in favor of the Commission a ground which had been litigated adversely to it previously.

The displaced drivers had no "choice" in this matter. Those who had been employed in the "southern" seniority district had nowhere else to bid and were compelled to accept assignments in the "eastern" district where many were unable to earn as much as they had averaged before the sale. "Central" seniority district drivers, who still had bidding rights, did not "choose," in the voluntary sense implied by the Commission, to "ride-out bids and not move to the carrier's eastern district," as the Commission states, 97 M.C.C. at 433. They were in fact required by contract to remain in their home seniority district unless and until furloughed in that district, and then and only then were they permitted bidding rights into the "eastern" district. As shown above, even when this happened and they secured these new bidding rights, they were still unable, for many months, to earn as much as they had averaged before. The conclusions of the Commission to the contrary are not only not supported by substantial evidence, they are indeed contrary to the record.

(b) *"Bumped" Drivers.* The Commission refused to grant any conditions for the protection of the drivers who, because of their lower seniority ranking, were "bumped" by the 22 other drivers who lost their jobs because of the sale. 97 M.C.C. at 441 n. 6. Under the circumstances of this case, this disposition is particularly unfortunate.

At the hearings before the Commission, Amalgamated attempted to introduce into evidence specific illustrative examples of employees who had been bumped into lesser paying or otherwise less desirable jobs. But, on objection from the carriers, Amalgamated was refused the opportunity to do so by the Hearing Examiner, and Amalgamated was limited to an offer of proof on this point. It is grossly unfair now for the Commission to hold the adverse effects seem impossible to ascertain, minor in extent and difficult to attribute to the transaction. This was the Commission's doing, not Amalgamated's, and the court below erred in failing to rectify the matter.

Before the court below, the Commission conceded that "there may have been bumpings." But, the Government went on to contend that the record did not show these bumpings were "unavoidable," or that they "resulted directly from the transaction." Again, the record is otherwise, and does not support the Commission's contention. Both drivers who testified at the hearing, one from the "southern" district and the other from the "central," testified they had bumped other less senior drivers when they took jobs in the "eastern" district. One even testified that he had himself been bumped by a more senior driver after the

sale and that this was one of the reasons why his earnings were lower.[14]

(c) *"Lump-Sum" Settlement Allowance.* The Commission, in imposing a limited form of protection as a "lump-sum" settlement allowance, departed from its customary practice in railroad cases and, without any reasoned explanation whatever, refused to grant conditions protective against the losses sustained in the forced sale of real estate and forced cancellation of leases. The Commission, again differently from its practice in railroad cases, also arbitrarily restricted the protection accorded by limiting the provision to a one-year period.

The Commission cites no basis in the record for these restrictions. There is no support anywhere in the record that excess rents and utility costs experienced by the displaced drivers abruptly ceased at the end of one year. Railroad employees receive protection in this regard for a full four years and the Commission, absent some reasoned explanation, should have

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[14] The treatment by the Commission of bumped drivers also illustrates the discrimination practiced by the Commission against motor carrier employees, as compared with railroad employees. In a recent railroad proceeding, the carrier questioned whether bumped employees were within the scope of the protective conditions granted railroad workers. The Commission's response was explicit:

> "It is definitely our intention that the protection afforded by the conditions shall be available to all employees dismissed or displaced as a result of a chain reaction resulting from the exercise of seniority rights by an employee whose job is abolished or whose work is transferred . . . Such 'secondary' results are within the scope of the conditions." *Southern Railway Co.—Control—Central of Georgia Ry.*, 317 I.C.C. 729, 730-731 (1963).

extended the same measure of relief to the motor carrier employees affected herein.

The Commission virtually conceded error in the court below by admitting that the Commission would have granted this additional protection to railroad employees. But, the Commission argued, because in certain other regards the drivers received more protection against certain other unrelated miscellaneous costs than railroad employees receive, the drivers cannot be heard to complain. Clearly, however, the equal protection of the law cannot be negated so facilely. Each injury must be weighed, and each item of protection examined, to determine whether the Commission has supplied the reasoned explanation required by law in granting or denying protection. Only after this has been done. may it be said that the protection ordinarily given railroad employees has been properly denied to the American drivers.[15]

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[15] One other ground was cited by the Commission in support of its denial of full protective conditions. The Commission, relying on data through the year 1958, attempted to portray a weakened financial status of American. The reasons why the Commission limited its view to that period are unknown. The annual reports of the carrier to the Commission from 1960-1964 reflect a quite different picture. In 1960 American had net income of $667,000, and an earned surplus of $650,000. By 1964, the earned surplus had increased to $1,500,000, on a net income of $500,000. The Commission can hardly contend that American lacks the wherewithal to pay employee protection. And no argument has yet been made why the employees should not share in the financial successes experienced by American since 1958.

CONCLUSION

For the reasons stated, the questions presented in this case are substantial, they are deserving of this Court's review, and jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

(Filed April 20, 1966)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 644-65

AMERICAN BUSLINES, INC., *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

Civil Action No. 684-65

AMALGAMATED TRANSIT UNION, AFL-CIO, *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

AMERICAN BUSLINES, INC., NATIONAL ASSOCIATION OF MOTOR BUS OWNERS, *Intervening Defendants*.

Civil Action No. 894-65

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and LOCAL UNION 549, *Plaintiffs*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

OVERNITE TRANSPORTATION COMPANY and RUTHERFORD FREIGHT LINES, INC., *Intervening Defendants*.

Opinion

James E. Wilson, Warren Woods, and Jon F. Hollengreen, of Washington, D. C., for the Plaintiff in C.A. 644-65 and for Intervening Defendant, American Buslines, Inc., in C.A. 684-65.

I. J. Gromfine and William B. Peer, of Washington, D. C., for the Plaintiff in C.A. 684-65.

Herbert S. Thatcher and David S. Barr, of Washington, D. C., for the Plaintiffs in C.A. 894-65.

William H. Orrick, Jr., Assistant Attorney General of the United States, and John H. D. Wiger, Department of Justice; David G. Bress, United States Attorney; Robert W. Ginnane, General Counsel, and Leonard S. Goodman, Assistant General Counsel, Interstate Commerce Commission; of Washington, D. C., for Defendants.

Robert J. Corber, of Washington, D. C., for Intervening Defendant, National Association of Motor Bus Owners, in C.A. 684-65.

J. W. Alexander, Jr., of Charlotte, North Carolina, and W. T. Croft, of Washington, D. C., for Intervening Defendants Overnite Transportation Company and Rutherford Freight Lines, Inc., in C.A. 894-65.

Before BURGER, United States Circuit Judge, and McGUIRE and CURRAN, United States District Judges.

CURRAN, J.: Two of these consolidated civil actions involve attacks by two labor unions upon orders of the Interstate Commerce Commission in *Midwest Buslines, Inc.—Purchase (Portion)—American Buslines, Inc.*, 97 M.C.C. 426, and in *Overnite Transportation Co.—Purchase—Rutherford Freight Lines, Inc.*, 97 M.C.C. 568, on the grounds that the Commission gave too little financial protection to adversely affected employees in certain financial transactions between motor carriers. The third action, filed by American Buslines, Inc., seeks to set aside the order entered in the *Midwest* case for the alleged reason that the Commission gave too much protection to the affected employees. These three actions are filed pursuant to 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325.

This is the second time that the *Midwest* case is before the Court, as neither the union nor the buslines company was satisfied with the order of the Commission on the remand. The *Overnite* case was filed by the Teamsters Union and is an attempt to reargue the legal issues presented in the first appeal of the *Amalgamated* case. In that case, the Commission approved the purchase of two of the American Buslines routes by Midwest Buslines and reserved jurisdiction for three years to entertain any employee petitions regarding needed financial protection from a possible adverse effect of the transaction. The purchase was completed December 31, 1959. On September 20, 1960, the Commission granted Amalgamated's petition to reopen the proceeding, allowing it to show "specifically how, and to what extent, particular employees of the carriers concerned have been adversely affected". The Commission declined to impose any conditions on behalf of the employees in the reopened proceeding.

This Court set aside the order of the Commission, stating it "need not attempt to delineate what measure of relief, if any, should be provided to the employees of American Buslines, Inc." and "that if any particular measure of relief is one which would ordinarily be granted to railroad workers similarly situated the Commission should not deny it to the employees of American Buslines, Inc., without a reasoned explanation of its denial, consistent with what has here been said". On the remand of the *Amalgamated* case, the Commission reopened its proceedings but stated that it was "for consideration on the record as made".

In August, 1964, the Commission issued its report on reconsideration. It conditioned its order upon payment by American of a "lump sum settlement" to certain of the employees to cover "loss of pay while moving, temporary maintenance of two households, and the excess of rents and utilities costs paid for a period of one year after the date

of such reassignment". The Commission also provided compulsory arbitration if there was any disagreement over this protection that might arise between the bus company and the union. In February, 1965, the Commission denied a petition for a reconsideration. Both Amalgamated, in Civil Action No. 684-65, and American Buslines, in Civil Action No. 644-65, attack this order.

In the *Overnite* proceedings, the Commission approved the purchase by Overnite of Rutherford Freight Lines, "in view of vendor's declining traffic and revenues and the resulting trend toward substantial deficits which, if continued, will result only in its demise as a carrier". The Commission rejected the argument of the Teamsters Union that the transaction be denied on the grounds that Overnite was a non-union motor carrier and approved the transaction, subject to the customary protection in motor carrier cases of three months' severance pay payable to the adversely affected employees, which it found to be just, reasonable and adequate protection.

The following statutes are involved:

Section 5(2)(c) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(c)—In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

Section 5(2)(f) of the Act, 49 U.S.C. § 5(2)(f)—As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Com-

mission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

The defendants, The United States of America and the Interstate Commerce Commission, suggests that the questions raised by these three consolidated cases are as follows:

1. Does the Commission policy to protect motor carrier and railroad employees differently have a rational basis and warrant in the statute?

2. Is the protection granted the motor carrier employees in the two purchase transactions before the Court fair and equitable both to the employees and the involved motor carriers?

3. Does the Commission have statutory authority to require compulsory arbitration of disputes over the protection it affords employees as a condition to its approving a transaction under Section 5 of the Act?

We agree.

Motor carrier employees do not need very much financial protection from the adverse effects of Section 5 transactions, for they move in an expanding industry and possess quite a degree of transferability within the industry itself. We also agree with the Commission that "the skills of motor carrier employees are more adaptible (sic) than the more technical and limited skills of most railroad employees". Displaced railroad employees meet with more difficulties in obtaining similar positions and, therefore, they need more protection than do motor carrier employees.

The standard of fair and equitable protection which the Commission must grant to motor carrier employees will not be found in the standard established for railroad employees. While Section 5(2)(f) of the Act requires certain minimum financial protection over a period of four years to railroad employees, no such requirement has ever been enacted by the Congress for motor carrier employees. In the railroad cases, the minimum protection is prescribed by the statute, and discretion is given only to increase such protection, while in the motor carrier cases, no minimum is prescribed by the statute, for the statute only grants a discretion to award protection to motor carrier employees that is fair and equitable.

The Commission was not required to follow the mandate of the Congress regarding the minimum protection granted railroad employees as a guide to the minimum protection for motor carrier employees. We cannot say that, under the circumstances of these cases, the motor carriers' employees involved are so similarly situated to railroad employees as to entitle them to more protection than the Commission has awarded them.

We hold, therefore, that the policy of the Interstate Commerce Commission to protect employees affected by financial transactions between motor carriers differently from employees where railroads are involved is supported by a rational basis and is authorized in the statute.

In the *Midwest Buslines* case, the employees are protected from the adverse effects which resulted from the transaction, while in *Overnite*, the protection extends to employees in a transition from one job to another in the motor carrier industry. In *Overnite*, the Commission found that three months' severance pay would provide "benefits to dismissed employees for a long enough period that aggressive job-hunting should be successful". It found, further, that three months pay would not impose "such a burden on vendee as to imperil its financial stability or as to preclude consummation".

The only financial loss to employees that the Commission could here attribute to the Midwest Busline occurred with its employees who were required to change their place of residence following the strike. Congress has prescribed no minimum statutory criteria for motor carrier employees, for the only standard is whether the particular protection of each case is fair and equitable in the circumstances. The majority of the Commission has granted only such protection as the employees would have been entitled to had they followed their work, and such protection seems fair and equitable to employees of American Buslines.

We hold, therefore, that the protection given to motor employees of the two proceedings before the Court is fair and equitable to both the employees and the involved motor carriers.

In Civil Action No. 644-65, American Buslines take the position that the Commission has no authority to direct that disagreements over the amount of a particular lump-sum settlement be submitted to binding arbitration. This argument has no legal efficacy for the Commission's power to require binding arbitration has previously been sustained. See *New Orleans and Northeastern Railroad Co.* v. *Bozeman*, 312 F. 2d 264 (5th Cir. 1963). The subject of arbitration will not be any labor-management matter, nor, as this Court has already decided, any matter foreclosed

by the strike settlement agreement. The Commission requires only that disputes over the exact amount of lump-sum payments due particular individuals be submitted to an arbiter.

We hold, therefore, that the Commission may lawfully require compulsory arbitration of disputes over the protection granted employees as a condition to its approving a transaction under Section 5.

The three consolidated actions are dismissed and the two decisions of the Interstate Commerce Commission are sustained. This opinion constitutes the findings of fact and the conclusions of law, and counsel for the United States and the Interstate Commerce Commission shall submit an appropriate order not inconsistent with this opinion.

APPENDIX B

No. MC-F-7041[1]

MIDWEST BUSLINES, INC.—PURCHASE (PORTION)—AMERICAN BUSLINES, INC.

Decided August 17, 1964

Upon reconsideration, findings in the prior reports, 80 M.C.C. 681, and 90 M.C.C. 173, modified.

Additional appearances: *Frederick S. Hill, William B. Devaney,* and *Robert J. Corber,* for intervener, and *William B. Peer* for protestant.

Report of the Commission on Reconsideration

TUGGLE, *Commissioner:*

In the initial report, 80 M.C.C. 681, decided November 12, 1959, purchase, for a total amount of $625,000, by Midwest Buslines, Inc., hereinafter called Midwest, in No. MC-

[1] This report embraces No. MC-F-7042, Continental Tennessee Lines, Inc.—Purchase (Portion)—American Bus Lines, Inc.

F-7041, and by Continental Tennessee Lines, Inc., hereinafter called Continental, in No. MC-F-7042, of separate portions of the operating rights and certain property of American Buslines, Inc., hereinafter called American, and the acquisition of control thereof, through the transactions, in the first transaction by Trammel Crow, and in the second transaction, by Continental Southern Lines, Inc., and in turn, by Transcontinental Bus System, Inc., was approved and authorized subject to certain conditions. One of the conditions reserved jurisdiction for a period of 3 years from the dates of consummation, to make such adidtional findings and impose such terms and conditions with respect to employees as might be necessary and lawful, if, upon petition by such employees or their representatives within that period, it was shown that the condition of their employment or interests incident thereto had been or would be adversely affected by anything done, or proposed to be done, pursuant to, or as a direct result of, consummation of the transactions.[2] It was also provided that consummation of the transactions would be considered as acceptance of the reservation of jurisdiction. Both transactions were consummated on December 31, 1959.

As a result of a petition filed April 11, 1960, by Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO, hereinafter called Amalgamated, the proceedings were reopened by order of September 20, 1960, for further hearing for the limited purpose of affording an opportunity for the presentation of evidence showing specifically how, and to what extent, particular employees of the carriers concerned have been adversely affected within the meaning of the reservation condition.

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[2] At the time of the initial hearing in this matter, the employees of American were on strike.

In the report after further hearing, 90 M.C.C. 173, decided March 26, 1962, division 3, in denying the relief sought, stated:

> Assuming that the affected employees were not bound to accept the offers of Midwest and Ct, and that the rejection of such offers and the signing of the release of July 31, 1959, does not constitute a bar to the assertion of claims by the affected employees against American, there still can be no presumption that, except for consummation of the considered transaction, they immediately could have returned to work on their old runs. The strike seriously disrupted American's business and it is logical to assume that some time elapsed before it resumed full scale operations. Also, notwithstanding the furlough procedure required in the new agreement, it seems clear that all of the affected employees were in a position to obtain the necessary furlough, and to accept immediate employment in the eastern district at wage rates exceeding rates paid on the considered runs prior to the strike. Many earned more after than before the strike and no employee was required to accept a lower wage rate or to remain without work except by choice. While there is some indication that those transferring from the central district were subject to recall, and Elmore testified that he was recalled, the latter could have remained in the eastern district. His return also was a matter of choice.
>
> Considering the fact that the strike was a contributing factor to American's financial difficulties, that Amalgamated and the employees were well aware thereof and of the adjustments which would be necessary when they returned to work, that testimony was adduced indicating the matter of indemnification for lost wages and expenses was discussed and American was adamant in refusing to make any arrangements

> therefor, that no provision was made in the new agreement to compensate employees therefor, and that the employees otherwise won favorable terms, there is ample reason to conclude that the strike was settled on such basis and that the requirements of the conditions Amalgamated now seeks to have us impose as a condition to approval herein would tend to subvert the terms of the settlement reached by the parties.

The conditions sought by Amalgamated are set forth in appendix A to the report after further hearing and need not be repeated here.

Following denial of its petition, an action was brought by Amalgamated, as the collective bargaining representative of the employees of American, in the United States District Court for the District of Columbia, seeking to set aside the order of March 26, 1962, and to require the Commission to attach conditions to its order which would protect those employees against such losses as may have been incurred, or might in the future be incurred, as a result of the approval of the transactions. The court stated:

> In July of 1959 plaintiff and American Buslines, Inc., entered into an agreement as part of the strike settlement. In that agreement American Buslines, Inc., released all claims against the plaintiff and the plaintiff released American Buslines, Inc.
>
> > "from all sums of money, accounts, actions, suits, proceedings, claims unfair labor practice charges and demands, of whatever character or description which Amalgamated International from time to time had or has up to date of this release by reason of any account, cause, matter or thing."
>
> The Commission concluded that the employees' claims for protection now being made were waived by this agreement between the union and the American Buslines, Inc. We disagree. That agreement was

made as part of the strike settlement and covered claims "arising out of that strike and activities relating thereto." The claims now being made arise, in our view, out of the sale of the bus route to Midwest Buslines, Inc., rather than out of the strike "and activities related thereto."

The Commission also concluded that the offers of employment made by Midwest Buslines, Inc., to the striking employees of American Buslines, Inc., had the effect of defeating any right of those employees to protection in connection with the sale. The evidence before the Commission indicated that the job offers were rejected because the men would be paid at the rate for beginning operators; that they would be considered as "new employees"; that their seniority "would rank as of the time they first performed compensated service" with Midwest Buslines, Inc., and that the only seniority protection offered was the right to continue the existing ranking they had in picking the assignments on the Kansas City to Memphis route. These offers, we think, were inadequate.

The grounds on which the Commission relied in denying relief were accordingly erroneous, and its order must be set aside. *Cf. Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88, 94, 95 (1943).

The case will be remanded to the Commission for further proceedings not inconsistent with this opinion. We need not here attempt to delineate what measure of relief, if any, should be provided to the employees of American Buslines, Inc. That is a subject reversed, subject to judicial review, for the determination of the Commission in the first instance. But we think that if any particular measure of relief is one which would ordinarily be granted to railroad workers similarly situated, the Commission should not deny it to the employees of American Buslines, Inc., without a rea-

soned explanation of its denial, consistent with what has here been said. *Cf. Eastern Central Motor Carriers Association* v. *United States,* 321 U.S. 194, 210 (1944).

The proceedings were reopened for reconsideration on the existing record by order dated August 12, 1963.

By petition filed November 4, 1963, the National Association of Motor Bus Owners (the association), sought permission to intervene for the limited purpose of filing a brief on the questions of whether the application of labor protective conditions in the sale of motor carrier properties is mandatory in all cases, and whether labor protective provisions similar to those given rail employees are required by section 5(2)(c). By order of November 26, 1963, it was authorized to intervene for the limited purpose of filing the brief.

In its brief, the association asserts that labor protective provisions have been imposed in proceedings involving rail carriers on the basis of various considerations, none of which are applicable to the motor carrier industry, and that among these considerations were the following: (1) "The Government policy of sponsoring, promoting and sometimes ordering railroad consolidations, largely because of over-extension and control and manipulation of rail securities by financial operators;" (2) that a large portion of rail operating employees possess long training and skills that can ordinarily be used only in the railroad industry and are not readily adaptable to other types of jobs, while exactly the reverse is true in the motor carrier industry, where drivers constituting 50 percent of the total employment, have skills which are readily transferable to the operation of any type of motor vehicle, and that, likewise, the mechanics, dispatchers, clerks, and other employees are also readily adaptable to similar jobs in other industries; (3) that the very heavy impact of pressure from the rail-

road brotherhoods during the 1930's was largely instrumental in the adoption of legislation to protect railway labor, as distinguished from labor in general, in railroad mergers and consolidations; (4) that absorption of labor protective costs in railroad mergers and consolidations was not prohibitive because of the inherent financial strength of the railroad industry; and (5) that imposition of special mandatory labor protective conditions for railroad employees occurred only after the rail brotherhoods and railroad management had voluntarily entered into a negotiated agreement which largely provided identical relief. It argues that none of these considerations is properly applicable to the conditions under which the motor carrier industry operates; that there is no ambiguity or uncertainty with respect to the scope and application of section 5(2)(f), which is clearly limited to transactions involving carriers by railroad; and that section 5(2)(c) neither specifically nor by implication makes any reference to section 5(2)(f), but requires only that the Commission "give weight" to the interest of the carrier employees affected. It finally asserts that the Commission has gone somewhat further than the literal language of section 5(2)(c) to require that fair and equitable treatment be accorded motor carrier employees, but argues that "fair and equitable treatment" means, as the Commission has consistently found, conditions which are fair and equitable under the circumstances of a given case.

In reply, Amalgamated contends that the Commission has stated its position in terms which in no way turn upon the issue of whether the act requires the imposition of the same protective conditions for motor carrier employees as it does for railroad employees. It asserts that in *Hudson Bus Lines, Inc.—Pur.—Boston & Maine Transp. Co.*, 58 M.C.C. 133, the Commission made it clear that in motor carrier cases the employee protective conditions necessary to assure fair and equitable treatment were those imposed in *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C.

177, and *Chicago, B. & Q. R. Co. Abandonment*, 257 I.C.C. 700, hereinafter called the Oklahoma and Burlington conditions, respectively. Amalgamated also contends that the Commission reaffirmed the appropriateness of the railroad conditions for motor carrier employees in *Short Line, Inc. —Purchase—New England Transp. Co.*, 70 M.C.C. 459, and that the Commission, in the instant proceedings, again referred to the *Oklahoma* and *Burlington* conditions as furnishing the guide for protection of motor carrier employees.

Amalgamated argues that, in short, it makes no difference for the purposes of the instant proceedings whether section 5(2)(c) *requires* the same employee protective conditions for motor carrier employees as are required by section 5(2)(f) in the case of railroad employees, since the Commission has already decided, and reaffirmed in these proceedings, that, in effectuating the statutory obligation to provide fair and equitable treatment for motor carrier employees, "the conditions imposed in rail proceedings would be used to protect motor carrier employees in appropriate cases". It asserts that the Commission decided that for certain stated reasons this was not an "appropriate case" in which to apply any protective conditions, but that the court reversed the Commission on the ground that none of the reasons relied upon by the Commission warrant its refusal to protect the employees involved. Amalgamated contends that with the case in this posture, the Commission is commited to the proposition that, but for the reasons relied upon in its decision, it would have applied the rail conditions here, and that, therefore, the sole remaining task before the Commission is to establish for the employees involved, the measure of protection to which they are entitled. It finally argues that the reasons urged by the association in its brief for not imposing conditions are not supported by the record, have never been raised heretofore, and are without merit.

Before discussing the merits of the various contentions, a brief resume of the events which preceded and followed the commencement of these proceedings is necessary to delineate the status of the employees involved as of the time of the further hearing. It is unnecessary to repeat all the facts, which are adequately and correctly set forth in the prior reports of division 3 and the hearing examiners.

Following prolonged contract negotiations, during which the employees of American continued to work under the terms of an expired contract for approximately 17 months, Amalgamated and American failed to reach a new agreement, and American's employees were called out on strike July 1, 1958. As a result of the strike, and of substantial operating deficits for the period 1933 through August 1958, as explained more fully in the examiner's report following the initial hearing, American decided to dispose of portions of its operating rights and properties to raise sorely needed capital and to curtail the scope of its operations. In addition to the operating rights and properties sold in the instant proceedings, certain other operating rights and properties were disposed of in other proceedings.[3]

By orders of December 3, 1958, Midwest and Continental were authorized to temporarily lease separate portions of American's operating rights authorizing operations between Kansas City, Mo., and Memphis, Tenn., and between

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[3] No. MC-F-7044, *Continental Pacific Lines—Pur.—American Buslines, Inc.*, decided May 22, 1959 (not printed), and No. MC-F-7467, Transcontinental Bus System, Inc.—Control—Denver-Colorado Springs-Pueblo Motor Way, Inc., and Denver-Salt Lake-Pacific Stages, Inc., which embraced No. MC-F-7247, Denver-Colorado Springs-Pueblo Motor Way, Inc.—Purchase (Portion)—American Buslines, Inc., reported in *Transcontinental Bus Sys...., Inc.—Control,* 85 M.C.C. 383. In No. MC-F-7467, American disposed of its capital stock interest in the two last-named carriers. These applications were filed November 20, 1958, February 29, 1960, and July 6, 1959, respectively. Each of these transactions has been approved and consummated.

Memphis and Chattanooga, Tenn., respectively. Each offered employment to all of American's drivers utilized on the considered routes prior to the strike without seniority and at the beginner's pay scale prescribed in their respective union contracts with the Brotherhood of Railroad Trainmen, and with a local of Amalgamated different from that representing the drivers of American. Seven of the drivers went to work for Continental on the Memphis-Chattanooga run, but the remainder formerly operating that run refused the proffered employment, as did the drivers formerly employed on the Kansas City-Memphis run, upon being advised by Amalgamated that acceptance of employment with either Midwest or Continental would constitute strike breaking.

For the purpose of seniority, American's operations were divided into two divisions which, in turn, were subdivided into districts. The Kansas City-Memphis route was in the central district and the Memphis-Chattanooga route constituted the entire southern district of the same division. The latter district was completely eliminated by the sale of that route to Continental, leaving the drivers employed thereon without a home district for seniority purposes.

American and Amalgamated eventually executed a new labor-management agreement on July 18, 1959, supplemented by a further agreement dated July 31, 1959, in which American and Amalgamated agreed to release all claims against each other to that date. The strike finally terminated on August 1, 1959, and, by mutual consent, Amalgamated and American agreed that during the period of transition, while American was attempting to return its operations to normal and because the drivers were scattered all over the country, the seniority provisions of the agreement would not be strictly adhered to for a short period of time, and the drivers formerly on the routes sold could accept any work open to them wherever the jobs

might be. The new agreement made no provision for compensation to the drivers, from either route sold, for expenses incurred in moving to other districts.

Of the 21 active drivers employed on the Kansas City-Memphis route, 14 returned to work for American following settlement of the strike. Of the 19 active drivers on the Memphis-Chattanooga route, 7 accepted employment with Continental upon its commencement of temporary operations, and 8 returned to work for American following the resumption of operations after settlement of the strike. All of the affected employees were offered employment by American in August 1959, but a number refused. The offer was repeated in December 1959, and again some refused until April 1960, following advice from American that they should either return to work or forfeit all their seniority rights. Amalgamated is concerned only with the 22 drivers who returned to work with American.

On the termination of the strike and thereafter, American offered jobs in its eastern district to all the returning drivers. Some of these, however, refused such employment, and as a consequence thereof earned less wages after the strike than before the strike. "Each of the 22 employees had sufficient seniority to take the higher paying jobs, but some preferred to ride-out bids and not move to the carrier's eastern district. Those who did move, however, earned more after the strike than before the strike. The details concerning these offers by American, including the higher wages that might have been earned had the returning drivers accepted the available employment in American's eastern district, are set forth in the prior report."

The 14 drivers employed on the Kansas City-Memphis route were all based at Springfield, Mo., prior to sale of the route to Midwest. After their return to work, following settlement of the strike, all of the drivers except one, who was voluntarily furloughed, were placed in jobs with

American in the eastern, central, and western districts. The eight drivers employed on the Memphis-Chattanooga route were based at Florence, Ala., and Memphis and Chattanooga prior to its sale to Continental. Upon their return to work following the strike, with no home district remaining, seven were initially assigned to the eastern district, working out of Pittsburgh, Pa., and one to the western district, at his own request, working out of Los Angeles. The moves required by these reassignments resulted in expenses the drivers would not have incurred had they been reassigned to their pre-strike positions, including loss of pay while moving, the temporary maintenance of two households, increased rents and utilities costs in some instances, and storage and/or moving expenses. In addition to the direct effect of the transactions on the drivers formerly employed on the considered routes, certain drivers, junior in seniority and on more attractive runs, were collaterally affected by being "bumped" by the returning drivers, and they, in turn, "bumped" other drivers junior to them, some losing pay in the scramble for positions following settlement of the strike. However, no driver was dismissed as a result of the quest for positions. The assignment of the central district drivers to the eastern district was on a temporary basis, and they remained subject to recall. If recalled, they were required to return or forfeit their home district seniority. In the latter event, for seniority purposes, they would then be regarded as a new employee in the eastern district as of the time of the original assignment there. A recall would naturally result in the incurrence of additional expense for a driver on returning to his home district.

Issues and Applicable Law

It is clear that the drivers formerly employed on the routes acquired by Midwest and Continental have been adversely affected by the transactions. The questions for determination now are, (1) what measure of relief, if any,

should be provided those employees for the adverse effects on them flowing from the transactions, and (2) if a particular measure of relief is one which would ordinarily be granted to railroad workers similarly situated, should the same measure of relief be granted to the motor carrier employees here involved?

The protection which should be afforded carrier employees involved in section 5 proceedings has not, in motor carrier transactions, been subject to any fixed rule or formula, but rather has been determined upon the circumstances present in each case. Section 5(2)(c) provides that, "In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall *give weight to* the following considerations, among others: (1) the effect of the proposesd tranaction upon adequate transportation service to the public; * * * and (4) the interest of the carrier employees affected." Section 5(2)(f), however, provides that "As a condition to its approval, under this paragraph (2), of any transaction involving a *carrier or carriers by railroad* subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the *railroad employees* affected." And it further provides:

> In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the *carrier or carriers by railroad* affected by such order being in a worse position with respect to their employment, * * * [Emphasis supplied].

In the *Hudson Bus* case, *supra*, it is true that we referred to the conditions imposed in the *Oklahoma* and *Burlington* cases, and suggested that the parties use those cases as a guide in reaching an agreement with respect to the protection to be afforded the employees. We did not impose

those requirements as a condition in that case, however, but reserved jurisdiction, applicable only to vendor, for a period of 3 years to make such additional findings and impose such terms and condition with respect to employees of the vendor as might be necessary, if, upon petition by such employees or their representatives, within the reserved period, relief was shown to be warranted. In the *Short Line* case, *supra,* we stated that the issues therein were governed by the decision in the *Hudson Bus* case, and also reserved jurisdiction for a period of 3 years. On reconsideration, 75 M.C.C. 33, we there found that:

> The protection which should be afforded employees of carriers involved in section 5 proceedings is not subject to any fixed rule or formula but, rather, is a matter for determination based upon the circumstances present in each case. For example, section 5(2) makes a distinction between employees of railroads, on the one hand, and employees of motor carriers, on the other. Under paragraph (f) of that section it is mandatory that certain conditions be imposed for the protection of railroad employees. As to motor carriers, however, paragraph (c) provides that the interests of motor-carrier employees is only one of several elements to which weight must be given. Although not set forth as a specific directive as in the case of railroad employees, the act, taken as a whole, in our opinion, makes clear the congressional intent that public policy demands fair and equitable treatment of employees of motor carriers involved in section 5 proceedings.
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> • • • The record here, however, definitely shows that at least 5 of vendor's employees would be adversely affected as a result of consummation of the instant transaction under the terms and conditions proposed by applicants. The question is thus presented whether the interests of those employees should be given con-

trolling weight paramount to all other public-interest considerations or whether, in the light of the evidence showing that vendor is presently engaged in a retrenchment program because of continuing deficits and is furloughing employees in order to relieve the strain on its gradually worsening financial condition, it would be more in the public interest that a condition be imposed which would provide an equitable balance between the interests of the carriers involved, their employees, and the public.

* * * instead of reserving jurisdiction for a period of 3 years as set forth in the prior report, a condition should be imposed spelling out the protection deemed reasonable under the circumstances here presented. Considering all the evidence, we are of the opinion that any employee of vendor separated from his job because of consummation of the instant transaction should receive as a result thereof during the period in which he is unemployed, but for not to exceed 3 months, severance pay at the rate of his average monthly pay for the 12 months immeidately preceeding the month in which the transaction is consummated.

In *Baggett Transp. Co.—Purchase—Hunt Freight Lines, Inc.*, 75 M.C.C. 147, on reconsideration, we found:

The mandatory provisions of section 5(2)(f) concerning protection to employees, by their express terms apply only to rail carrier employees and not to employees of motor carriers. As to motor carrier employees, paragraph (c) requires that we give weight to and consider the effect the transaction would have on them, this being only one of the several elements specified in that paragraph to which weight must be given.

In that proceeding, we again imposed a condition requiring the payment of 3 months' severance pay to employees dis-

placed as a result of the transaction. In the report on further hearing, 87 M.C.C. 235, in affirming the findings in the prior reports, we stated that "it has been the established policy of the Commission to go no further than to require 3 months' severance pay for displaced employees."

Thus, it is apparent that Amalgamated's contention that the Commission has made it clear that the employee protective conditions *necessary* to assure fair and equitable treatment of motor carrier employees are those prescribed in the *Oklahoma* and *Burlington* cases, does not stand up under examination of the reports in which those cases have been cited. As indicated, in the *Hudson Bus* case, we merely suggested that the parties consider the *Oklahoma* and *Burlington* conditions as guides to the solution of their differences, and, as pointed out in the prior report after further hearing, in no instance has the Commission imposed such conditions where only motor carrier employees were involved.

While we are convinced that our interpretation in the cases cited and in the prior report of the distinction between the mandatory provisions of section 5(2)(f), applicable to railroad employees, and the wholly discretionary provisions applicable to motor carrier employees, is sound, an examination of the legislative history of the Transportation Act of 1940, clearly supports that interpretation. A committee, composed of six members representing railroad labor and management, appointed by the President of the United States, to consider the transportation problem and recommend legislation, in its report of December 23, 1938, to the President, recommended, among other things, the creation of a Transportation Board, and, in discussing railroad consolidations, stated:

> After the details of any proposed consolidation have been determined by the interests involved, they should be embodied in an application for approval, addressed to the Transportation Board. In passing upon such

an application, the Board should be governed by the following considerations:

* * * * * * * * *

(d) The interests of the employees affected. The Board shall examine into the probable results of the proposed consolidation and require as a prerequisite to its approval, a fair and equitable arrangement to protect the interests of the said employees.

Report No. 433 from the Senate Committee on Interstate Commerce dated May 16, 1939, regarding the proposed legislation, in discussing railroad consolidations, stated:

> Another important change which would be accomplished by section 49 of the bill is to be found in paragraph (3), (b), and (c). It is there provided * * * that the Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of section 49, a fair and equitable arrangement to protect the interest of the employees affected. The provisions referred to immediately above were included pursuant to the recommendations of the report of the Committee of Six (p. 30). There are no similar provisions in existing law.

Report No. 1217 from the House of Representatives, Committee on Interstate and Foreign Commerce, dated July 18, 1939, offered a substitute bill, and in a sectional analysis discussing section 8 thereof, entitled Pooling, Consolidations, Mergers and Acquisitions of Control in case of carriers by railroad, motor vehicle, and water, stated:

> * * * (4) Three additional paragraphs are added to renumbered paragraph (2) (corresponding to paragraph (4) of the present section 5). These additional paragraphs direct the Commission to give weight to the following considerations when passing upon any

> proposed transaction: * * * (4) the interest of the carrier employees affected. In respect of employees the Commission is directed to require as a prerequisite to its approval of any proposed transaction under this section "a fair and equitable arrangement to protect the interests of employees affected".

A letter dated January 29, 1940, from Commissioner Joseph B. Eastman, Chairman of the Legislative Committee, Interstate Commerce Commission, to the Chairman of the Senate Interstate Commerce Committee and the Chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives, contained the following comment:

> A large proportion of motor carrier unifications involve the absorption of failing lines. Often the acquiring carrier is seeking only to obtain the operating rights and is not interested in the operations of the other carrier as a going concern. The requirement that we impose a condition for the protection of employees, to say nothing of the proviso in lines 5-10, would therefore have the effect of prohibiting many such transactions. Very often this would not benefit the employees, for, unless acquired by some other carrier, the line for which they are working will die. It would, however, penalize the owners of the operating rights. We think it wiser to make the authority discretionary rather than mandatory.
>
> As for the proviso, the object of unifications is to save expense, usually by the saving of labor. Employees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called "Washington Agreement" of 1936 between the railroad managements and labor organizations.

Sections 5(2)(c) and 5(2)(f) appeared in their present form in Report No. 2832, dated August 7, 1940, from the Committee of Conference, and the statement of the managers on the part of the House accompanying said report contained the following comment:

SECTION 7. CONSOLIDATIONS, MERGERS, ACQUISITIONS OF CONTROL, ETC.

* * * * * * * * *

4. The House amendment included a provision (the Harrington amendment) prohibiting approval of any transaction which would result in unemployment or displacement of employees, or in the impairment of their employment rights. There was no similar provisions in the senate bill. In lieu of this proviso, the following provision has been included in the conference substitute:

[Section 5(2)(f) in its present form is then quoted.]

The substitute proposal for the Harrington amendment, as recommended to the conferees by instruction of the House, provided in substance that in case of consolidations and other unifications involving carriers by railroads, the Commission should in its order of approval require fair and equitable arrangements to protect the interests of the railroad employees affected. This provision has been retained in the substitute amendment agreed upon in conference.

The instruction of the House also made the provisions of the amendment applicable to the case where another means of transportation was substituted for rail transportation proposed to be abandoned. This provision is omitted from the substitute adopted in conference. A consideration of the application of this provision was, in the judgment of the conferees, found to be impracticable of proper administration.

From the foregoing, it can be seen that the references to mandatory conditions for the protection of employees mean only railroad employees, and, in the letter from the Chairman of the Legislative Committee, Interstate Commerce Commission, to the Chairman of the Senate Interstate Commerce Committee, and the Committee on Interstate and Foreign Commerce of the House of Representatives, a definite distinction was drawn between the protection that should be afforded motor and railroad carrier employees. Had Congress intended to accord motor carrier employees the same protection granted railroad employees by section 5(2)(f), it would not have made the provisions of that section mandatory, while, at the same time, writing the discretionary provisions contained in section 5(2)(c). It is clear that section 5(2)(f), consisting of only three sentences, is limited to railroad employees, and, in this respect, contains no ambiguities. Any attempt on our part to interpret it as embracing motor carrier employees would be a usurpation of the congressional function of legislation.

Conclusions

Although Amalgamated claims that the returning drivers are entitled to protection against any reduction of wages following the strike, we cannot find or conclude that any reduction has resulted from the transaction approved under section 5. Rather, the lesser wages of certain employees following the strike resulted from their own choice not to accept employment paying more than they were then earning. Labor conditions heretofore adopted by the Commission, whether for rail or motor carrier employees, have not and should not protect employees against the consequences of their own choice in refusing to make a change of residence. See, e.g., *Chesapeake & O. Ry. Co.—Control —Baltimore & O. R. Co.*, 317 I.C.C. 261, 286-87 (1962).

Based upon our examination of the legislative history of the Transportation Act of 1940, and the plain language of

the provisions of section 5(2)(c), which require that we give weight to "the effect of the proposed transaciton upon adequate transportation service to the public," and to "the interest of the carrier employees affected" we are, as previously indicated, convinced that the law does not *require* that we impose conditions for the protection of motor carrier employees. Section 5 does require us to consider all aspects of the transaction as they affect the public interest. This includes the effect on employees. And in determining whether employees should receive any protection or compensation for the adverse effect which a transaction has upon them, we must consider the size and financial resources of the carriers involved, the expanding nature of the motor carrier industry, and the high degree of transferability of motor carrier employees within the industry. With rare exceptions, motor carriers involved in section 5 transactions and their employees have been able to resolve their differences by mutual agreement. In no cases involving motor carriers have the protective conditions imposed gone beyond requiring the payment of severance pay to dismissed employees. See the *Short Line* and *Baggett* cases, *supra*. Although we have occasionally suggested voluntary consideration of the nature of the *Oklahoma* and *Burlington* conditions, they have not been, and, in our opinion, they should not be, in the absence of a congressional mandate similar to that contained in section 5(2)(f), imposed in motor carrier proceedings unless compelling reasons so dictate. No such compelling reasons are present here.

In determining whether conditions to protect or compensate employees adversely affected should be imposed, and the nature of such conditions, the estimated aggregate cost to the carrier or carriers in giving effect to the conditions is of importance in both rail and motor cases; and the financial condition of the carrier in relation to these estimated costs, has cometimes been the controlling element in decisions in abandonment proceedings under section 1(18)

of the act not to impose any such conditions. "We have refused to impose protective conditions in cases categorized as 'partial' abandonments by generally unprosperous carriers in the effort to reduce expenses and thereby preserve service to the public on their remaining lines'." *Maryland & P. R. Co. Abandonment*, 295 I.C.C. 719, 729. Our authority to impose employee protective conditions in abandonment proceedings, found by the United States Supreme Court to be implicit in section 1 of the act, but also to be discretionary, in *Interstate Commerce Commission* v. *Railway L. E. Assn.*, 315 U.S. 373, is similar to our discretionary power as to employees in motor carrier transactions under section 5. We have previously found, and Amalgamated apparently agrees, that the only employees adversely affected by these transactions were those of American. All were reemployed by American, none having been discharged. The extent of the adverse effect on the 22 drivers involved consists of the expenses incurred in moving their households, loss of pay while moving, temporary maintenance of two households, and increased rents and utility costs.

The record before us shows that, for the years 1953 through the first 8 months of 1958, American suffered operating losses of $1,067,211, $136,824, $39,494, $62,782, $392,494, and $523,992, respectively, or an aggregate loss of $2,222,797. During this period of deficit operations, American was undergoing reorganization[5] and was operated by a trustee from February 10, 1954, through September 22, 1958. Its monthly cash requirements approxi-

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[4] "We have declined, without exception, to impose conditions for the protection of employees where an entire railroad system is being abandoned." *Texas Electric Ry. Co. Abandonment*, 271 I.C.C. 391. "A departure from this principle in particular cases must be supported by clear and convincing evidence." *Okmulgee Northern Ry. Co. Abandonment*, 320 I.C.C. 637.

[5] *Transportation Properties, Inc.—Control, 75 M.C.C. 471.*

mated $800,000, and its only source of funds was from borrowing or the sale of portions of its properties. Although the financial impact which the imposition of the conditions sought by Amalgamated would have on American is by no means clear, it could well impose a substantial burden. The general public interest is paramount to that of either the carrier or the affected employees. Not only the traveling public, but the employees as well, will benefit in the long run if American is permitted to operate and improve its financial condition without burdensome conditions. However, and notwithstanding the precarious financial condition of American shown of record, after careful further consideration of all the facts and circumstances, and in light of the Court's opinion, we believe that a portion of the benefits and economies which American reasonably might expect to achieve through the sale of the operations here involved should be used to compensate those 22 employees shown to have been adversely affected, in the form of a lump-sum payment approximately equal to the costs incurred in moving their households as above outlined.[6] The record does not reflect estimates of those costs, which can be ascertained only on the basis of information supplied by the respective drivers.

Upon reconsideration, we find that the findings in the prior report on further hearing, 90 M.C.C. 173, decided March 26, 1962, should be modified and supplemented, in accordance with the discussion herein, and by the imposition of the following condition to the authority granted, and that the said findings should be affirmed in all other respects:

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[6] It may be that certain "bumped" drivers were collaterally affected, but the adverse effect, if any, seems impossible to ascertain minor in extent, and difficult to attribute to this transaction rather than to the strike or other personnel adjustments. It is unnecessary and inappropriate to provide benefits to them.

provided, however, that any of the 22 driver employees of American Buslines, Inc., who were forced to incur expenses in moving their households because of reassignments made as a result of the transactions herein authorized, including loss of pay while moving, temporary maintenance of two households, and the excess of rents and utilities costs paid for a period of one year after the date of such reassignment, shall be paid a lump-sum settlement by American Buslines, Inc., approximately equal to the amount of such costs; and, in the event of any dispute or controversy arising with respect to the protection afforded by the foregoing condition, which cannot be settled by the carrier and employee, or his authorized representative, within 30 days after the controversy arises, it may be referred, by either party, to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedure, and expenses, shall be agreed upon by the carrier and employee, or his duly authorized representative.

An appropriate order will be entered.

COMMISSIONER FREAS, whom CHAIRMAN GOFF and COMMISSIONER BUSH join, dissenting in part:

In no case involving motor carriers have we gone beyond requiring the payment of severance pay to displaced employees. A departure from this principle should rest upon clear and convincing evidence. The facts in this case fail to show unequivocally that the adverse effects suffered by the involved employees were caused solely or primarily by the purchase transactions. Indeed, the facts indicate rather that the pecuniary losses suffered by the employees may in large measure be attributed to the employees themselves.

Upon the facts in this case, I would not impose any employee protective conditions.

COMMISSIONER HUTCHINSON whom COMMISSIONER TUCKER joins, dissenting in part:

I disagree with the majority report to the extent that it is determined that the employees have been adversely affected as the result of the transactions.

The evidence indicates (1) that following the strike the drivers were scattered all over the country, (2) that there was a shortage of drivers in the eastern district, (3) that American offered jobs in the eastern district to the 22 employees who returned to work for American, and (4) that those who accepted the proffered employment earned more after the strike than they did before the strike. In view of these facts and the impossibility of separating those effects caused by the strike and its termination from those flowing from the transactions, I am not convinced that the employees have been adversely affected as a result of the transactions. I would, therefore, affirm the ultimate findings in the report of March 26, 1962, and I would not impose protective conditions.

APPENDIX C

Section 5(2)(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made,

it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

Section 5(2)(c). In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

* * * * * * * * * *

Section 5(2)(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable

arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 497

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA AND LOCAL UNION 549,
Appellants,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees,

OVERNITE TRANSPORTATION COMPANY AND RUTHERFORD FREIGHT LINES, INC.,
Intervening Appellees.

On Appeal from a Decision of a Three-Judge United States District Court for the District of Columbia.

JURISDICTIONAL STATEMENT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. .....

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA AND LOCAL UNION 549,
Appellants,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees,

OVERNITE TRANSPORTATION COMPANY AND RUTHERFORD FREIGHT LINES, INC.,
Intervening Appellees.

On Appeal from a Decision of a Three-Judge United States District Court for the District of Columbia.

JURISDICTIONAL STATEMENT.

OPINIONS BELOW.

Three civil actions were consolidated in the court below —Nos. 644-65, 684-65 and, the instant case, 894-65. The opinion of the court in the consolidated cases is reported

at 253 F. Supp. 481 and is reproduced in Appendix A, *infra*. The court's judgment appears in Appendix B, *infra*. The report of the ICC appears at 97 M. C. C. 568, and is reproduced in Appendix C, *infra*.

JURISDICTION.

Complaint was filed by appellants on April 16, 1965, to set aside an order of the Interstate Commerce Commission. The jurisdiction of the three-judge District Court was invoked pursuant to 28 U. S. C., §§ 1336 and 2321-2325. The court issued an opinion, constituting its findings of fact and conclusions of law, filed April 20, 1966. Final judgment dismissing the complaint was entered on May 4, 1966. Notice of Appeal was filed in the District Court by appellants on July 1, 1966. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b). See **American Trucking Associations, Inc. v. United States**, 364 U. S. 1; **Schaffer Transportation Co. v. United States**, 355 U. S. 83.

STATUTES INVOLVED.

The pertinent provisions of Section 5 of the Interstate Commerce Act, 49 U. S. C., Sec. 1, et seq., are as follows:

> "5 (2) (b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, . . . If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; . . . If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reason-

able, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: . . . ."

"5 (2) (c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: . . . (4) the interest of the carrier employees affected."

"5 (2) (f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, . . ."

QUESTIONS PRESENTED.

1. Whether the court below erred in sustaining the Commission's interpretation of Section 5 (2) (c) of the Interstate Commerce Act, 49 U. S. C., Section 5 (2) (c), as permitting the Commission to impose conditions for the protection of employees adversely affected by an amalgamation or merger of two motor carriers of a substantially lesser nature and degree than conditions ordinarily imposed to protect similarly situated employees adversely affected by amalgamation or merger of railroads?

2. Whether the court below erred in failing to find and conclude that Section 5 (2) (c) of the Interstate Commerce Act, as interpreted and applied by the Commission in the manner aforesaid, contravenes the due process clause of the Fifth Amendment of the Constitution of the United States in that, as compared to railroad employees, the provision arbitrarily and capriciously classifies motor carrier employees, and effects invidious discrimination against them in the protection afforded against losses incurred as a result of amalgamation or merger?.

3. Whether the court below erred in sustaining an Order whereby the Commission imposed conditions for the protection of employees adversely affected by an amalgamation or merger of two motor carriers of a substantially lesser nature and degree than conditions ordinarily imposed to protect similarly situated employees adversely affected by amalgamation or merger of railroads, without establishing a factual basis for such differentiation, based on the record before it, or otherwise offering a reasoned or rational explanation therefor?

4. Whether the court below erred in sustaining an Order whereby the Commission limited the protection afforded employees upon merger or amalgamation of two motor carriers to three-months severance pay, without factual or rational support for such limitation?

STATEMENT OF THE CASE.

A. Proceedings Before the I. C. C.

Overnite Transportation Company of Richmond, Virginia (hereafter called "Overnite") and Rutherford Freight Lines, Inc. of Bristol, Virginia (hereafter called "Rutherford"), by a joint application[1] filed March 21, 1963 with the Interstate Commerce Commission (hereafter called "ICC" or "Commission"), sought authority under section 5 of the Interstate Commerce Act for the purchase by the former of the operating rights and property of the latter. Appellants (collectively referred to herein as "Union") intervened for the purpose, *inter alia,* of seeking certain employee protective conditions with respect to those employees who would be adversely affected by the acquisition, if granted by the ICC.

Pursuant to an Order of the ICC, dated May 20, 1963, a hearing was held before Examiner David S. Letts on June 25 and 26, 1963, at which hearing the parties appeared and presented evidence as follows:

Rutherford's employees include 175 drivers, and 49 administrative personnel. Of the total of 224 employees, Overnite would expect to employ 132, leaving the balance of 92 persons to be separated as a result of the proposed transaction. Rutherford's drivers are members, and have for many years been members, of the Union, their employment conditions being governed by successive and various collective bargaining agreements (Exh's 7, 8, 10, and 11; Tr. 243). None of Overnite's employees are unionized (Exh. 25; Tr. 14; H. E. Report, p. 5).

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[1] All documents referred to herein, including briefs ("Br."), exhibits ("Exh."), transcript ("Tr."), the report of the hearing examiner ("H. E. Report"), and the report of the I. C. C. ("ICC Report"), are part of the original record before the ICC and the court below which has been certified to and filed with this Court.

The Union urged, *inter alia*, that if the application were approved the ICC should impose upon Overnite the same or similar employee protective conditions as the ICC consistently imposes upon railroads in similar circumstances. More specifically, the Union argued for these protections:

1. For former Rutherford employees who retain employment status but who either because of displacement from their former positions or because they otherwise suffer a loss of former income or benefits because of their employment with Overnite, a monthly displacement allowance should be paid to compensate them for a period of four years, for any such loss based on their average earnings for the year preceding such displacement.

2. For dismissed employees, that is, those who lose jobs entirely, either a monthly dismissal allowance equal to the aforementioned displacement allowance, or a lump sum separation allowance determined in accordance with a schedule of benefits based upon length of service, should be paid.

3. In the event employees are required to change their residence, as a result of a transfer of routes, conditions should be imposed insuring such employees against losses in the sale of real estate, broken leases, and for reimbursement of moving expenses for themselves and families.

4. Recognition of years-of-service seniority held by Rutherford employees should be given for all purposes.

5. Any dispute arising out of the application of the foregoing protective conditions should be submitted to arbitration for determination (Br., pp. 27-28).

With respect to employee protection, the sole commitment advanced by Overnite in its application (Exh. D, attached thereto, par. D 5) was the following: "It

proposes to interview all of transferor employees who so desire to be interviewed relative to their becoming connected with transferee in the area in which they are presently employed in suitable capacities." At the hearing, Overnite made further representations as follows:

1. As to employees who will be displaced or separated, Overnite will grant no protection or benefit (Tr. 129).

2. With respect to former Rutherford employees who may be employed by Overnite but required to move their homes, possessions and families to another location, Overnite stated "that it would pay something" (Tr. 129; see also Tr. 120). "You move a fellow 15 miles, what we allow may pay all his expenses, but may not pay all of the expenses of a man who moves two or three hundred" (Tr. 129). Apart from partial payment of actual moving costs, Overnite will pay nothing—including losses incurred in the sale of homes or real estate or similar losses resulting from the transfer (Tr. 130).

3. In employing former Rutherford employees, Overnite will apply the present Overnite rates, compensation and benefits in all instances, including those instances where the Overnite rates, compensation or benefits might be less than those presently accorded the Rutherford employees (Tr. 123; 133-4).[2]

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[2] The record contains substantial evidence that such instances may well occur. Thus, the mileage rate for Overnite line-haul drivers is 8½¢, while the mileage rate for Rutherford line-haul drivers varies from 9.25¢ to 10.3¢ (Tr. 132-133, 148; Exh. 7, Art. 23, Sec. 1, p. 38). Rutherford's warehouse employees are better paid than those of Overnite (H. E. Report, p. 5). Rutherford employees enjoy more liberal vacation benefits than do employees of Overnite. (Tr. 110-111, 165; Exh. 7, Art. 29, pp. 55-57; Exh. 8, Art. 20, p. 32; Exh. 10, Art. 20, pp. 31-32; Exh. 11, Art. XXII, pp. 34-35). Rutherford employees are governed strictly by seniority with respect to advancement, demotion, lay-off, recall, bidding, filling of vacancies, etc. At Overnite, these matters are governed by other considerations

4. While Overnite's offers of employment to Rutherford employees may be made in order of seniority, Overnite will unilaterally determine each employee's qualification and ability as a condition to employment (Tr. 116, 130, 157, 162). Once employed, a Rutherford employee will be immediately eligible for holiday, vacation and insurance benefits, as though he had worked for Overnite (Tr. 161). However, his years of service with Rutherford will avail him nothing in the area of job security and advancement, *e. g.*, lay-off, recall, bidding for jobs, equipment, routes, transfers, or "bumping" (Tr. 163). And this despite the fact that many employees of Rutherford have accumulated many years of seniority (Tr. 228).

On October 1, 1963, the Hearing Examiner issued his Report and Order recommending approval of the acquisition. **Overnite Transportation Co.—Purchase—Rutherford Freight Lines, Inc.**, No. MC-F-8393. The sole condition recommended for the protection of employees was three months severance pay for displaced Overnite employees or separated Rutherford employees, disputes over the foregoing to be submitted to arbitration, as follows:

> [A]ny employee of Rutherford Freight Lines, Inc., separated from his position with that carrier on and after the date of this report or any employee of Overnite Transportation Co., displaced by an employee of Rutherford Freight Lines, Inc., because of the transaction herein authorized, shall receive for a period of not more than three months, severance pay from Rutherford Freight Lines, Inc., or Overnite Transportation Co., respectively, at the rate of his average monthly pay for the 12 months immediately preceding the month in which he was discharged, said pay-

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(Exh. 7, Art. 5, p. 12; Exh. 8, Art. 2, p. 7; Exh. 10, Art. 5, p. 12; Exh. 11, Art. V, p. 12; Tr. 116-119, 127, 130, 150, 155-157, 161-164).

ments, however, to be reduced by the amount of his total wages earned during the period in which he was otherwise employed during the three months, including unemployment benefit payments received under any unemployment insurance; and provided, further, that in the event of any dispute or controversy arising with respect of the protection, afforded under the foregoing condition, which cannot be settled by the carrier and employee, or his authorized representative, within 30 days after the controversy arises, it may be referred, by either party, to an arbitration committee, for consideration and determination, the formation of which committee, its duties, procedures, expenses, etc., shall be agreed upon by the carrier and the employee, or his duly authorized representative. (H. E. Report, pp. 13-14.)

On November 20, 1963, the Union filed timely exceptions with the ICC, complaining, *inter alia,* of the Examiner's refusal to impose the employee protective conditions requested by the Union and relying principally upon **Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO v. U. S.**, 221 F. Supp. 959 (D. D. C. 1963), a prior decision of the district court in a companion case, wherein it was ruled:

> The case will be remanded to the Commission for further proceedings not inconsistent with this opinion. We need not here attempt to delineate what measure of relief, if any, should be provided to the employees of American Buslines, Inc. That is a subject reserved, subject to judicial review, for the determination of the Commission in the first instance. But we think that if any particular measure of relief is one which would ordinarily be granted to railroad workers similarly situated, the Commission should not deny it to the employees of America Buslines,

Inc., without a reasoned explanation of its denial, consistent with what has here been said. **Cf. Eastern-Central Motor Carriers Association v. United States,** 321 U. S. 194, 210 (1944).

On July 31, 1964, the ICC issued its Report in the instant case, denying the relief requested by the Union, and responding to the foregoing mandate of the district court as follows:

> In the first place, as previously noted, the law does not require that provisions for the protection of motor carrier employees be imposed. In addition, the skills of motor carrier employees are more adaptable than the more technical and limited skills of most railroad employees. Motor carrier maintenance employees are more readily absorbed into maintenance work in garages and similar establishments, truck drivers are employable in numerous industries in addition to motor carrier operations, and clerical workers are readily absorbed into industry. Even employees with more technical skills are more readily absorbed into the expanding trucking, bus, and public automobile businesses. The rail transportation industry, on the other hand, is unique in that it generally has a full complement of employees with very few openings for new employees. The trend toward fewer operating rail employees is one of public knowledge. Displaced rail employees, therefore, would encounter more difficulty in securing similar positions and, consequently, need more protection from adverse effect than do motor carrier employees.
>
> The majority of the approximately 18,500 motor carriers regulated by this Commission are considerably smaller than a majority of the railroads. The motor carriers, as a rule, do not have substantial resources, are subject to greater competition, have high operating ratios, and generally do not have the

capacity to absorb any substantial or long-term compensation awards.[2] Many motor carriers dispose of their rights and properties only because they are financially unable to continue their service to the public. Imposition of protective conditions, in such instances, often would defeat or impede the transfer and possibly result in adverse effects to service under the operating rights and to the public. In addition, it is clear that if such unifications are not authorized, the result may be the demise of the weaker carriers as well as the loss of all jobs of their employees (App. C, pp. 55-56).

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[2] We recognize that vendee here is neither small nor unprofitable.

Having concluded that its authority under section 5 (2) (c) is discretionary, the Commission proceeded as follows:

> In view of such discretion, the question presented is whether, under the circumstances presented, the condition proposed by the hearing examiner in this proceeding is just, reasonable, and adequate. We conclude that it is. It provides benefits to dismissed employees for a long enough period that aggressive job-hunting should be successful without imposing such a burden on vendee as to imperial its financial stability or as to preclude consummation. Such condition, which we adopt as somewhat modified, is set forth in the findings herein (App. C, p. 56).

In final result, the ICC not only refused to go beyond the three months severance protection granted by the Examiner, but further qualified and diminished said protection as follows:

> Any person previously employed by either carrier and in a lay-off status on the date of service of the

order herein, and who has been in such status for a period of at least 6 months prior thereto, shall not be deemed to be an employee of either carrier on such date and thereby is not entitled to the benefits of the protective condition (App. C, p. 57).

B. **Proceeding in the Court Below.**

The Union filed its complaint on April 16, 1965, to set aside the Commission's order. Overnite and Rutherford were permitted to intervene. The instant Case No. 894-65 was consolidated with Case Nos. 644-65 and 684-65 for hearing before a three-judge court. On April 20, 1966, the court issued an opinion, constituting its findings of fact and conclusions of law, and on May 4, 1966, entered a judgment sustaining the ICC decision and dismissing the complaint. This appeal followed.

QUESTIONS ARE SUBSTANTIAL.

The proceeding, for the first time, brings to this Court for review an Order of the ICC which in broad strokes of general principle—unrelated to the case, unsupported by the record, and devoid of rational basis—decrees that motor carrier employees require and deserve far lesser protective conditions in situations of merger or consolidation than their counterparts in the railroad industry. It thus brings into question the proper application of the National Transportation Policy "to encourage fair wages and equitable working conditions" (54 Stat. 899, 49 U. S. C. preceding § 1) and of the mandate of the Interstate Commerce Act (49 U. S. C., § 5 (2) (c)) that the Commission give weight to "the interest of the carrier employees affected." Moreover, the Act, as interpreted and applied by the Commission, effects arbitrary and invidious discrimination between motor carrier employees and railroad employees, and must therefore be measured

against the Constitutional yardstick of the Fifth Amendment.

The Court has on several occasions examined the subject of employee protective conditions in the context of railroad transactions, each time with ample recognition of its importance to the National Transportation Policy and the public interest. In **U. S. v. Lowden**, 308 U. S. 225, the Court held:

> "[I]t is thus apparent that the steps involved in carrying out the congressional policy of railroad consolidation in such manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress and its harsh consequences may so seriously affect employee morale as to require their mitigation both in the interest of the successful prosecution of the congressional policy of consolidation and of the efficient operation of the industry itself, both of which are of public concern within the meaning of the statute" (308 U. S. at 233).
>
> * * * * * * * *
>
> "Congress has thus declared that fair and equitable provision for the compensation of losses thrown upon employees as the result of an authorized consolidation or lease promotes the national transportation policy by developing, coordinating and preserving the railroad transportation system" (308 U. S. at 238).

In **ICC v. Railway Labor Executives' Ass'n**, 315 U. S. 373, the Court directed the ICC to protect employees adversely affected by a railroad abandonment, despite the Commission's stand that the statute limited such remedy to cases of consolidation only.

Never before, however, has the Supreme Court given guidance to the Commission, unions, employees, carriers

and the public as to the proper protections to be afforded motor carrier employees and as to the proper interpretation of § 5 (2) (c) of the Act, particularly in its relationship to § 5 (2) (f). As a result the Commission has for years relegated motor carrier employees to a subservient role, in an absolute sense as well as in comparison with the interests of carriers and railroad employees.

Of nearly equal importance is the Commission's disregard of this Court's admonitions that decisions of administrative agencies must be supported by reason, based on the record, and directed to the facts and circumstances of the case. **Schaffer Transp. Co. v. U. S.**, 355 U. S. 83; **S. E. C. v. Chenery Corp.**, 318 U. S. 81; **Eastern-Central Motor Carriers Ass'n v. U. S.**, 321 U. S. 194.

Hence as to each of the following issues it may justly be said: "the question looms large in the administration of the Act." **S. E. C. v. Chenery Corp.**, 318 U. S. 81.

ARGUMENT.

I.

The Statute Must Be Interpreted, Particularly in Avoidance of Substantial Constitutional Challenge, as Requiring Equal Treatment Between Motor Carrier and Railroad Employees.

There can be no doubt that the particular protective conditions sought by the Union in this case[3] are those which would ordinarily be granted to railroad workers similarly situated. The protection sought here is based upon established sources and authorities developed in railroad cases: (1) the Washington Agreement of 1936, an industry-wide collective bargaining agreement between a great majority of the Nation's railroads and railroad labor organizations, which specified conditions for the protection of employees adversely affected by mergers;[4] (2) the "Oklahoma Formula", a formula derived from the protective conditions first imposed by the Commission in **Oklahoma Ry. Co. Trustees Abandonment**, 257 ICC 177, 179 (1944); and (3) the "Burlington Conditions", conditions first imposed by the Commission in and deriving their name from **Chicago, Burlington and Quincy Ry. Co. Abandonment**, 257 ICC 700, 704 (1944); (4) with respect to protection of seniority rights, see **St. Paul Bridge and Terminal R. R. Co.**, 199 ICC 588, 597 (1934); **United States v. Lowden**, 308 U. S. 225, 233 (1939); **ICC v. Railway Labor Executives' Ass'n.**, 315 U. S. 373, 374 (1943); Condition 5 of the Oklahoma Formula, 257 ICC at 198; Condition 1 of the Burlington Conditions, 257 ICC at 704.

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[3] Explained in full at page 6, *supra*.

[4] A discussion of this Agreement and its terms is found in **United States v. Lowden**, 308 U. S. 225 (1939). See also **Brotherhood of Maintenance of Way Employees v. United States**, 366 U. S. 169, 173 (1961).

In 1960 alone, the Commission conditioned its approval of Section 5 railroad transactions upon acceptance by the carriers of the Oklahoma Formula in four cases. See 307 ICC 702; 311 ICC 13, 75, 138, 147. Many other railroad cases, in which comprehensive protective conditions have been imposed, are listed in the Appendix to the Brief of the United States and Interstate Commerce Commission in **Brotherhood of Maintenance of Way Employes v. United States**, 366 U. S. 169 (1961). Even greater protection was provided in the Commission's decision and order in **Chesapeake and Ohio Ry.—Control—Baltimore & Ohio R. R.** 317 ICC 261, 346-349 (1962).

The sole pre-condition to the imposition of these protections has been a showing that some employees would be adversely affected by the transactions. **Chicago & N. W. Ry. Co. Merger**, 261 ICC 672, 675 (1946). The record in the instant case indicates clearly that employees will be adversely affected, and it was so found by the Commission, H. E. Report, pp. 12-13. Indeed, it was pursuant to that finding that the Commission immediately imposed its meager three-month severance pay condition, rather than "reserving jurisdiction."[5]

Manifestly, the consistent course of ICC decisions demonstrates that had Overnite been a railroad, rather than a motor carrier, the imposition of "railroad" conditions would have been virtually "automatic."[6] To the

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[5] In motor carrier cases, the Commission has usually "reserved jurisdiction," as it did in companion Case Nos. 644-65 and 684-65. See also, **The Greyhound Corp.—Control—Southeastern Greyhound**, 57 M. C. C. 123, 156 (1950). However, in this case and in **The Short Line, Inc.,—Purchase—New England Transp. Co.**, 75 M. C. C. 33 (1958) and **Baggett Transp. Co.—Purchase—Hunt Freight Lines, Inc.**, 75 M. C. C. 147 (1958), the Commission imposed the three-month severance condition without reserving jurisdiction.

[6] The sole exception we know of, and the only one cited by the Commission (ICC Report, p. 19), has been the Commission's refusal to impose conditions where **total abandonment** of a rail

employees involved, the distinction is of no small importance. Railroad conditions include four years of protective compensation for dismissed employees and displaced employees, as well as full compensation for loss involved in transferring or moving from one location to another. Motor carrier employees similarly situated are normally limited to three months severance pay for dismissed employees. The discrimination thus employed by the Commission is rank and startling.

The Commission, with the sanction of the court below, argues that Section 5 (2) (f) commands the granting of specific protections to railroad employees only, thus by implication giving the Commission discretion to give lesser protection to motor carrier employees. But one thought does not follow the other. Section 5 (2) (c) compels the Commission to give weight to "the interest of the carrier employees affected." This stricture applies equally to railroad and motor carrier employees. Section 5 (2) (f) requires that in any "transaction involving a carrier . . . by railroad . . . the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." However, the Commission itself determined that it could hardly deny to motor carrier employees the application of the very same "fair and equitable" standard. In **Short Line, Inc.—Purchase—New England Transport Co.**, 75 M. C. C. 33, 37, it stated:

> "Although not set forth as a specific directive as in the case of railroad employees, the Act, taken as a whole, makes clear the congressional intent that public policy demands fair and equitable treatment of employees of motor carriers."

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line is proposed. In that situation, of course, there is no surviving corporation to pay benefits and no surviving employees to receive them. In this case, on the other hand, Overnite "survives" and its financial position (already healthy by any standard) improves by virtue of the transaction.

Indeed in **Hudson Bus Lines**, 58 M. C. C. 133, the Commission suggested that the parties use the **Oklahoma** and **Burlington** (railroad merger) cases, *supra*, as a guide in reaching an agreement with respect to the protection to be afforded the employees. Having itself interpreted the statute as requiring the application of the same standard to both groups of employees, it may not now be heard to deny it.

The Commission's argument is reminiscent of its position before the Court in **I. C. C. v. Railway L. Ex. Ass'n**, 315 U. S. 373 (1942), where it urged that the difference in language between two sections of the Act rendered it impotent to grant protective conditions for the benefit of employees in a railroad abandonment case. The Court responded as follows:

> "The Commission argues that the conditions it is authorized to impose under the consolidation section —'just and reasonable' which 'will promote the public interest'—are of much broader scope than the conditions it is authorized to impose under the abandonment section—conditions which 'the public convenience and necessity may require.' Although admitting that provisions for the protection of displaced employees may be a condition that 'will promote the public interest,' the Commission concludes that such provisions cannot be required by 'the public convenience and necessity.'
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> On the contrary, the Lowden Case recognizes that the unstabilizing effects of displacing labor without protection might be prejudicial to the orderly and efficient operation of the national railroad system. Such possible unstabilizing effects on the national railroad system are no smaller in the case of an abandonment like the one before us than in a consolidation

like that involved in the Lowden Case" (315 U. S. at 376-377).

The Court expressed its chagrin over a Commission interpretation which "requires us to impute to Congress a policy of mandatory protection for labor in unifications and no protection at all in abandonments" (315 U. S. at 379-380). Similarly here the unstabilizing effects on the transportation system of displacing labor with meager protection would be no smaller in the case of motor carriers than in the case of railroads. Further, as in the foregoing case, this Court should not impute to Congress an intent to effect unreasoned discrimination between two classes of employees similarly situated and affected under the Act.

The legislative history of the Act, while silent on the reason, if any, for the appearance of the word "railroad" in Section 5 (2) (f), is amply clear that Congress intended even-handed regulation of railroads and motor carriers. In fact the very reason for the enactment of the Motor Carrier Act (49 Stat. 543) in 1935 was to ease the burden on the railroads created by unfair competition from unregulated motor carriers—competition which in large part was permitted by differentials in wages and working conditions as between the regulated and unregulated industries.[7] As noted by this Court:

> "With the addition of motor and water carriage to its previous jurisdiction over rails, [the Commission] was charged not only with seeing that the rates and services of each are reasonable and not unduly discriminatory, but that they are coordinated in accordance with the National Transportation Policy, as declared by the later legislation. This . . . was de-

[7] Hearings on S. 1629, Senate Committee on Interstate Commerce, 74th Cong., 1st Sess. 50, 51, 417, 423, 476, 542; S. Rep. No. 482, 74th Cong., 1st Sess. 3 (1935).

> signed to eliminate destructive competition not only within each form but also between or among the different forms of carriage."[8]

It takes no brilliant analysis to discern that the Commission's grant of much lesser protection to motor carrier employees than it grants to railroad employees is hardly conducive to the elimination of "destructive competition . . . among the different forms of carriage." Its interpretation of the Act, therefore, not only fails to comport with, but deals a severe blow to, the intention of Congress.

It is further worthy of note that in 1938, prior to the enactment of Section 5 (2) (f), the Commission granted to railroad employees protection similar to that which is now required by that section, and this under a standard which merely required the Commission to "promote the public interest." **Chicago, Rock Island & Gulf Railway Co. Trustees Lease**, 230 I. C. C. 181, aff'd sub nom. **United States v. Lowden**, 308 U. S. 225 (1939). Surely, therefore, Congress must have envisioned that similar protection would be accorded motor carrier employees under the more compelling and specific mandate of Section 5 (2) (c).

The court below was, therefore, in error in holding, with the Commission, that the latter's "policy . . . .to protect employees affected by financial transactions between motor carriers differently from employees where railroads are involved is . . . authorized by the statute" (App. A, p. 37). The statute, as so interpreted and applied would be constitutionally defective in that it invidiously and arbitrarily discriminates against the motor carrier class of employees. **Bolling v. Sharpe**, 347 U. S. 497 (1954); **United States v. Petrillo**, 332 U. S. 1 (1947); **Williamson v. Lee Optical Co.**, 348 U. S. 483 (1955); **Morey v. Doud**,

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[8] **Eastern-Central M. C. Ass'n v. United States**, 321 U. S. 194, 206.

354 U. S. 457 (1957); **Smith v. Cahoon**, 283 U. S. 553 (1931); **F. S. Royster Guano Co. v. Virginia**, 253 U. S. 412 (1920). The principle is well established, however, that when challenged constitutionally a statute will be interpreted in such a way, if possible, as will preserve its validity. **Greene v. McElroy**, 360 U. S. 474, 507, 508 (1959); **Kent v. Dulles**, 357 U. S. 116, 129 (1958). For this and other reasons above assigned Congress should not be presumed to have authorized the unequal and unfair treatment which characterizes the consistent course of Commission policy.

II.

The Commission Was in Error in Granting to Motor Carrier Employees Substantially Less Protection Than Normally Granted to Railroad Employees, Without Establishing a Factual Basis for Such Differentiation, Based on the Record Before It, or Otherwise Offering a Reasoned or Rational Explanation Therefor.

The Commission's stated and applied policy is to grant motor carrier employees substantially lesser benefits than it grants to railroad employees similarly situated. This policy squarely contradicts the intent of Congress. For rather than promote the elimination of competition among different classes of carriers, the policy defeats it. Moreover, the 4 year protection called for by Section 5 (2) (f) obviously defines and explains what is meant by "fair and equitable," a standard which the Commission itself has admitted to be applicable to motor carrier and railroad employees alike. **Short Line, Inc.—Purchase—New England Transport Co.**, 75 M. C. C. 33, 37.[9] What this suggests, at the least, is that in applying Section 5 (2) (c) the Commission was to utilize the protection specified in

[9] Indeed the court below referred to the "standard of fair and equitable protection" as one "which the Commission must grant to motor carrier employees" (App. A, p. 36).

Section 5 (2) (f) as a guide to what is "fair and equitable" for motor carrier employees, with the right to vary therefrom if the circumstances in a particular motor carrier case compelled, for good and sufficient reason, the imposition of lesser (or greater) conditions. Undeniably the Commission's policies must be "consistent with the statutory standards which govern its action" and, in their application to particular cases, must be "formulated not only after due consideration of the factors involved but with sufficient explication to enable the parties and [the Court] to understand, with a fair degree of assurance, why the Commission acts as it does."[10]

For these reasons the district court was correct when, in a prior case,[11] it held:

> ". . . we think that if any particular measure of relief is one which would ordinarily be granted to railroad workers similarly situated, the Commission should not deny it to the employees of [the motor carrier], without a reasoned explanation of its denial . . ."

The Commission's sole attempt in that direction was its general and unsupported comparisons between the railroad and motor carrier industries, which may be paraphrased and categorized as follows:

1. The Commission stated that as compared with railroad employees, motor carrier employees are more readily absorbed into other types of work, other industries or the expanding motor carrier market and their skills are more adaptable. "Displaced rail employees, therefore, would encounter more difficulty in securing similar positions and,

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[10] **Eastern-Central M. C. Ass'n v. United States**, 321 U. S. 194, 211-212 (1943).

[11] **Amalgamated Ass'n v. United States**, 221 F. Supp. 958, 961.

consequently, need more protection from adverse effect than do motor carrier employees'' (App. C, p. 55).

These statements find no support in the record. No such evidence was offered or sought by the Commission. Nor does the Commission cite any supporting authorities or statistics. Moreover, the assertion is not addressed to this case. It may well be, were the facts known, that the motor carrier market in the geographical area involved here is contracting, or that the Rutherford employees have developed and been trained in particular skills not so adaptable to change or transferal, or that railroad employees similarly situated have greater freedom of movement in the market involved here. Finally, while labor market and skill mobility may have a bearing on severance pay protection, it will have little or no bearing upon seniority or moving-cost protections. In a word, the Commission issued a ''broad and conclusive declaration, in general terms, without supporting data or reasons, except as supplied by the policy itself,'' concerning ''a matter upon which the record factually throws no light.''[12]

2. The Commission stated that the ''majority'' of motor carriers are considerably smaller than the ''majority'' of railroads and ''as a rule'' motor carriers do not have substantial resources, are subject to greater competition, have high operating ratios, and ''generally do not have the capacity to absorb any substantial or long-term compensation awards.'' ''Imposition of protective conditions, in such instances, often would defeat or impede the transfer and possibly result in adverse effects to service under the operating rights and to the public'' (App. C, pp. 55-56).

Here again is an unsupported statement ''not limited to the particular competitive situation.''[13] What is worse,

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[12] **Eastern-Central M. C. Ass'n v. United States**, 321 U. S. at 202, 211.

[13] **Eastern-Central M. C. Ass'n v. United States**, 321 U. S. at 202.

it assumes the existence of conditions which are overwhelmingly **refuted** by the present record. Consider the following undisputed facts, as found by the Hearing Examiner and adopted by the Commission.[14]

> Vendee's balance sheet as of March 31, 1963, shows assets aggregating $10,829,239, consisting of: Current assets $2,588,503 principally cash $583,146, U. S. Treasury bills $295,464, deposit on utilities $100,017, accounts receivable $1,277,460, material and supplies $113,943, and prepayments $218,473; carrier-operating property, less depreciation, $7,478,059; intangible property $41,000; and other assets $721,677. Liabilities were: Current liabilities $2,339,451, including notes payable $3,425, accounts payable $889,208, accrued liabilities $449,047, taxes accrued $997,771; long term obligations, due within one year, $91,971; due after one year $2,989,682, reserve for deferred income tax $594,991; capital stock $1,010,353, premiums and assessments on capital stock $135,357, and earned surplus $3,667,434.
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> Its income statements for 1961, 1962, and the first five months of 1963, show operating revenues of $17,383,353, $19,469,819, and $8,404,875, net income, before provision for income taxes of $2,422,276, $3,203,997, and $1,368,418, and after such provision, $1,121,122, $1,558,247, and $637,054, respectively. Its operating ratios for the 1961, 1962, and the first five months of 1963, were 84.84, 82.73 and 84.53 (H. E. Report, p. 4).
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> Vendee maintains approximately 30 terminals and offices scattered throughout the territory which it serves. It operates 252 trucks, 448 tractors, 814

[14] In the following excerpts, Overnite is referred to as "Vendee", and Rutherford as "Vendor". The facts recited by the Hearing Examiner, as quoted here, were adopted by the Commission at ICC Report, pp. 2-3 (App. C, pp. 42-43).

trailers, and 66 service vehicles. It presently utilizes 17 more vehicles than at the time the instant application was filed. The stock of Overnite has been sold to members of the public since 1957, and recently has been listed on the New York Stock Exchange. (H. E. Report, p. 6).

Overnite's growth and improved financial standing as a result of the proposed transaction were shown as follows:

> Vendee believes that the unified rights can be used to its advantage from the standpoint of service and economy. Vendor's equipment can be improved considerably and savings can be effected through volume purchases, joint solicitation efforts, in claims adjustments, and through a reduction in administrative costs. Duplicate terminals would be consolidated at Richmond, Greensboro and Atlanta. It estimates that vendor's revenues of about $3,000,000 annually can be increased to $5,000,000 within three or four years and that there would a resulting increase in traffic transported under its own authority (H. E. Report, p. 6).
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> In addition, vendee has available a revolving credit of three and one-half million dollars, under a commitment with the First National City Bank of New York, N. Y.
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> Giving effect to consummation of the proposed transaction as of February 28, 1963, vendee's balance sheet would have shown assets of $18,272,408, including current assets $2,109,152, as compared with current liabilities of $2,947,574. Capital assets would have been increased $1,013,572 and long-term debts increased by $583,400. Revenue equipment of vendor having a net book value of $347,617, has been appraised by independent appraisers at $538,100.

> The giving effect balance sheet reflects further an increase of $522,746 for intangibles as a result of this transaction. Vendee estimates that had it operated under vendor's rights in connection with its own, for the first two months of 1963, it would have increased its revenues by $418,765 to $3,608,071, and increased its net income before provisions for income taxes, by $48,848, and after such provisions, $21,973, as compared with vendee's actual income during the same period of $3,189,306, $539,941, and $242,973, respectively. On an annual basis its net income, after provisions for income taxes, would have been increased $131,838 annually. If these expectations were realized it would earn about 11 to 12 percent on the investment and would enable vendee to recoup the amount assignable to the operating rights of $522,746, in less than four years, as the result of income produced by the combined operating rights. The fixed charges resulting from the transaction would not be contrary to the public interest (H. E. Report, pp. 6 and 7).

In the face of these facts, the Commission's tame concession—"We recognize that vendee here is neither small nor unprofitable" (App. C, p. 56, fn. 2)—seems grossly understated. The facts affirmatively support the feasibility and desirability of imposing "railroad" protective conditions herein, by the Commission's own standard. Yet the facts were inexplicably ignored.

3. "In addition", said the ICC, "it is clear that if such unifications are not authorized, the result may be the demise of the weaker carriers as well as the loss of all of their employees" (App. C, p. 56). It is equally clear, we submit, that if such unifications are not authorized **in the railroad industry**, the same result would follow. In any event, there is no argument before this Court that such unifications should not be authorized—only that

such authorization should be conditioned upon fair and equitable protection for the employees involved, as required by the statute.

Neither the parties nor the courts should be bound to "sheer acceptance of the Commission's conclusion, in the form of its statement of the result and cryptic formulation of the policy on which it is rested."[15] It is hoped that a decision by this Court in the instant case

> ". . . will lead the Interstate Commerce Commission, despite its enormous volume of business, to a more detailed and illuminating formulation of the reasons for the judgment that it reaches even in that class of cases where Congress has relied on the Commissions's discretion in enforcing the most broadly expressed Congressional policy. Since the orders in such cases also fall under judicial scrutiny, it is desirable to insist upon precision in the findings and the reasons for the Commission's action."[16]

III.

Even Without Regard to Protections Normally Extended to Railroad Employees, the Commission Was in Error in Limiting the Protection Afforded in the Instant Case to Three-Months Severance Pay, Without Factual or Rational Support for Such Limitation.

The Commission's sole reference to the facts in this case was the following:

> "In view of such discretion, the question presented is whether, under the circumstances presented, the

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[15] **Eastern-Central M. C. Ass'n v. United States,** 321 U. S. at 209.

[16] **Schaffer Transportation Co. v. United States,** 355 U. S. 83, 95 (separate opinion by Frankfurter, J.).

> conditions proposed by the hearing examiner in this proceeding is just, reasonable, and adequate. We conclude that it is. It provides benefits to dismissed employees for a long enough period that aggressive job-hunting should be successful without imposing such a burden on vendee as to imperil its financial stability or as to preclude consummation. Such condition, which we adopt as somewhat modified, is set forth in the findings herein (App. C, p. 56).

The ICC's approach is reminiscent of its error in **Schaffer Transportation Co. v. U. S.**, 355 U. S. 83, 90, where this Court said:

> "Rather than evaluate the benefit that Schaffer's proposed motor service might bring to the public, the Commission cast its first principal conclusion in terms of the adequacy of existing rail service, finding that service to be 'reasonably adequate'."

The proper question, of course, is not whether the Hearing Examiner's recommended relief was "adequate" but whether "the interest of the carrier employees affected" demanded more or different relief. It was clear that as a result of the Overnite-Rutherford merger, employees would be dismissed, employees would be displaced, and employees would suffer moving expenses. There is no evidence that, for dismissed employees, three months would be "a long enough period that aggressive job-hunting should be successful." There is no benefit whatever for displaced employees or those who would suffer moving expenses—and such protections were withheld for no reason which appears in the Commission's Report. Moreover, the Commission's concern that greater protections for the employees might "imperil" Overnite's "financial stability" or "preclude consummation" is wholly without factual support or justification. Quite to the contrary, as has been shown, the record demonstrates that

Overnite can well afford to pay substantial benefits.[17] "[T]he Commission's reason is insufficient justification for its action."[18]

At the very least, the appellants here, others similarly situated, and the general public, are entitled to a Commission explanation for the inconsistencies inherent in its own motor carrier decisions. In **Hudson Bus Lines**, 58 M. C. C. 133 (1951), the Commission suggested that the parties use the **Oklahoma** and **Burlington** cases as a guide in reaching an agreement with respect to the protection to be afforded the employees. Yet no such suggestion is proffered in the instant case. In **American Buslines**, 90 M. C. C. 173, 188, the ICC hedged its denial of protective conditions in the following terms:

> ". . . our findings should not be construed as opposing **in all instances** the imposition of conditions for the protection of motor carrier employees affected by transactions under section 5, similar to those in the Oklahoma formula and Burlington conditions . . ." (emphasis supplied).

Nevertheless, a careful reading of the ICC's opinion in the instant case fails to reveal why **this case** may not constitute one of those "instances" calling for the application of the **Oklahoma** or **Burlington** conditions.

In two recent motor carrier cases, the Commission has imposed conditions beyond the three-month severance provision, yet has failed to similarly act in this case. Thus, in **Midwest Buslines—Purchase (Portion)—American Bus Lines**, No. MC-F-7041,[19] the Commission added to the

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[17] Overnite itself was moved to characterize its business as "now-flourishing." Applicants' Reply to Protestants' Exceptions, p. 45.

[18] **American Trucking Ass'n v. United States**, 364 U. S. 1, 14 (1960).

[19] This is the ICC decision sustained by the court below in companion Case Nos. 644-65 and 684-65.

three-month severance condition a requirement of a lump sum payment approximately equal to the costs incurred by adversely affected employees in moving their households. Yet in the instant case we are given no reasoned explanation for the Commission's denial of the same condition. Similarly, in **Indiana Motor Bus Co.—Purchase—Chicago, South Shore and South Bend R. R.**, No. MC-F-8122 (1963), the Commission added to the severance allowance a three-month displacement allowance. But, again, in the instant case we are offered no rationale for its denial.

CONCLUSION.

"The problem is novel . . . the matter is one of general importance . . . It may touch vitally the public interest. It involves, to some extent, the important task of reconciling previously established railroad policies with, or adapting them to, the requirements of the presently effective National Transportation Policy and its application to a coordinated transportation system."[20] Therefore, jurisdiction should be noted and the case reversed and remanded for disposition consistent with the opinion of this Court.

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[20] **Eastern-Central M. C. Ass'n v. United States**, 321 U. S. 194, 209-210 (1943).

APPENDIX.

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APPENDIX A.

(Filed Apr. 20, 1966.)

United States District Court for the District of Columbia.

American Buslines, Inc., Plaintiff,
v.
United States of America and Interstate Commerce Commission, Defendants.

Civil Action. No. 644-65.

Amalgamated Transit Union, AFL-CIO, Plaintiff,
v.
United Stafes of America and Interstate Commerce Commission, Defendants.

Civil Action. No. 684-65.

American Buslines, Inc., National Association of Motor Bus Owners, Intervening Defendants.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Local Union 549, Plaintiffs,
v.
United States of America and Interstate Commerce Commission, Defendants,

Civil Action. No. 894-65.

Overnite Transportation Company and Rutherford Freight Lines, Inc., Intervening Defendants.

Opinion.

James E. Wilson, Warren Woods, and Jon F. Hollengreen, of Washington, D. C., for the Plaintiff in C. A.

644-65 and for Intervening Defendant, American Buslines, Inc., in C. A. 684-65.

I. J. Gromfine and William B. Peer, of Washington, D. C., for the Plaintiff in C. A. 684-65.

Herbert S. Thatcher and David S. Barr, of Washington, D. C., for the Plaintiffs in C. A. 894-65.

William H. Orrick, Jr., Assistant Attorney General of the United States, and John H. D. Wigger, Department of Justice; David G. Bress, United States Attorney; Robert W. Ginnane, General Counsel, and Leonard S. Goodman, Assistant General Counsel, Interstate Commerce Commission, of Washington, D. C., for Defendants.

Robert J. Corber, of Washington, D. C., for Intervening Defendant, National Association of Motor Bus Owners, in C. A. 684-65.

J. W. Alexander, Jr., of Charlotte, North Carolina, and W. T. Croft, of Washington, D. C., for Intervening Defendants, Overnite Transportation Company and Rutherford Freight Lines, Inc., in C. A. 894-65.

Before Burger, United States Circuit Judge, and McGuire and Curran, United States District Judges.

Curran, J.: Two of these consolidated civil actions involve attacks by two labor unions upon orders of the Interstate Commerce Commission in **Midwest Buslines, Inc.—Purchase (Portion)—American Buslines, Inc.**, 97 M. C. C. 426, and in **Overnite Transportation Co.—Purchase—Rutherford Freight Lines, Inc.**, 97 M. C. C. 568, on the grounds that the Commission gave too little financial protection to adversely affected employees in certain financial transactions between motor carriers. The third action, filed by American Buslines, Inc., seeks to set aside the order entered in the **Midwest** case for the alleged reason that the Commission gave too much protection to the

affected employees. These three actions are filed pursuant to 28 U. S. C., §§ 1336, 1398, 2284, and 2321-2325.

This is the second time that the **Midwest** case is before the Court, as neither the union nor the buslines company was satisfied with the order of the Commission on the remand. The **Overnite** case was filed by the Teamsters Union and is an attempt to reargue the legal issues presented in the first appeal of the **Amalgamated** case. In that case, the Commission approved the purchase of two of the American Buslines routes by Midwest Buslines and reserved jurisdiction for three years to entertain any employee petitions regarding needed financial protection from a possible adverse effect of the transaction. The purchase was completed December 31, 1959. On September 20, 1960, the Commission granted Amalgamated's petition to reopen the proceeding, allowing it to show "specifically how, and to what extent, particular employees of the carriers concerned have been adversely affected". The Commission declined to impose any conditions on behalf of the employees in the reopened proceeding.

This Court set aside the order of the Commission, stating it "need not attempt to delineate what measure of relief, if any, should be provided to the employees of American Buslines, Inc.," and "that if any particular measure of relief is one which would ordinarily be granted to railroad workers similarly situated, the Commission should not deny it to the employees of American Buslines, Inc., without a reasoned explanation of its denial, consistent with what has here been said." On the remand of the **Amalgamated** case, the Commission reopened its proceedings but stated that it was "for consideration on the record as made".

In August, 1964, the Commission issued its report on reconsideration. It conditioned its order upon payment by American of a "lump sum settlement" to certain of

the employees to cover "loss of pay while moving, temporary maintenance of two households, and the excess of rents and utilities costs paid for a period of one year after the date of such reassignment". The Commission also provided compulsory arbitration if there was any disagreement over this protection that might arise between the bus company and the union. In February, 1965, the Commission denied a petition for a reconsideration. Both Amalgamated, in Civil Action No. 684-65, and American Buslines, in Civil Action No. 644-65, attack this order.

In the **Overnite** proceedings, the Commission approved the purchase by Overnite of Rutherford Freight Lines, "in view of vendor's declining traffic and revenues and the resulting trend toward substantial deficits which, if continued, will result only in its demise as a carrier". The Commission rejected the argument of the Teamsters Union that the transaction be denied on the grounds that Overnite was a non-union motor carrier and approved the transaction, subject to the customary protection in motor carrier cases of three months' severance pay payable to the adversely affected employees, which it found to be just, reasonable and adequate protection.

The following statutes are involved:

Section 5 (2) (c) of the Interstate Commerce Act, 49 U. S. C., § 5 (2) (c)—In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

Section 5 (2) (f) of the Act, 49 U. S. C., § 5 (2) (f)—As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

The defendants, The United States of America and the Interstate Commerce Commission, suggest that the questions raised by these three consolidated cases are as follows:

1. Does the Commission policy to protect motor carrier and railroad employees differently have a rational basis and warrant in the statute?

2. Is the protection granted the motor carrier employees in the two purchase transactions before the Court fair and equitable both to the employees and the involved motor carriers?

3. Does the Commission have statutory authority to require compulsory arbitration of disputes over the protection it affords employees as a condition to its approving a transaction under Section 5 of the Act?

We agree.

Motor carrier employees do not need very much financial protection from the adverse effects of Section 5 transactions, for they move in an expanding industry and possess quite a degree of transferability within the industry itself. We also agree with the Commission that "the skills of motor carrier employees are more adaptible (sic) than the more technical and limited skills of most railroad employees". Displaced railroad employees meet with more difficulties in obtaining similar positions and, therefore, they need more protection than do motor carrier employees.

The standard of fair and equitable protection which the Commission must grant to motor carrier employees will not be found in the standard established for railroad employees. While Section 5 (2) (f) of the Act requires certain minimum financial protection over a period of four years to railroad employees, no such requirement has ever been enacted by the Congress for motor carrier employees. In the railroad cases, the minimum protection is prescribed by the statute, and discretion is given only to increase such protection, while in the motor carrier cases, no minimum is prescribed by the statute, for the statute only grants a discretion to award protection to motor carrier employees that is fair and equitable.

The Commission was not required to follow the mandate of the Congress regarding the minimum protection granted railroad employees as a guide to the minimum protection for motor carrier employees. We cannot say that, under the circumstances of these cases, the motor carriers' employees involved are so similarly situated to railroad employees as to entitle them to more protection than the Commission has awarded them.

We hold, therefore, that the policy of the Interstate Commerce Commission to protect employees affected by financial transactions between motor carriers differently from employees where railroads are involved is supported by a rational basis and is authorized by the statute.

In the **Midwest Buslines** case, the employees are protected from the adverse effects which resulted from the transaction, while in **Overnite**, the protection extends to employees in a transition from one job to another in the motor carrier industry. In **Overnite**, the Commission found that three months' severance pay would provide "benefits to dismissed employees for a long enough period that aggressive job-hunting should be successful". It found, further, that three months pay would not impose "such a burden on vendee as to imperil its financial stability or as to preclude consummation".

The only financial loss to employees that the Commission could here attribute to the Midwest Buslines occurred with its employees who were required to change their place of residence following the strike. Congress has prescribed no minimum statutory criteria for motor carrier employees, for the only standard is whether the particular protection of each case is fair and equitable in the circumstances. The majority of the Commission has granted only such protection as the employees would have been entitled to had they followed their work, and such protection seems fair and equitable to employees of American Buslines.

We hold, therefore, that the protection given to motor employees of the two proceedings before the Court is fair and equitable to both the employees and the involved motor carriers.

In Civil Action No. 644-65, American Buslines take the position that the Commission has no authority to direct that disagreements over the amount of a particular lump-

sum settlement be submitted to binding arbitration. This argument has no legal efficacy for the Commission's power to require binding arbitration has previously been sustained. See **New Orleans and Northeastern Railroad Co. v. Bozeman,** 312 F. 2d 264 (5th Cir. 1963). The subject of arbitration will not be any labor-management matter, nor, as this Court has already decided, any matter foreclosed by the strike settlement agreement. The Commission requires only that disputes over the exact amount of lump-sum payments due particular individuals be submitted to an arbiter.

We hold, therefore, that the Commission may lawfully require compulsory arbitration of disputes over the protection granted employees as a condition to its approving a transaction under Section 5.

The three consolidated actions are dismissed and the two decisions of the Interstate Commerce Commission are sustained. This opinion constitutes the findings of fact and the conclusions of law, and counsel for the United States and the Interstate Commerce Commission shall submit an appropriate order not inconsistent with this opinion.

APPENDIX B.

United States District Court for the District of Columbia.

American Buslines, Inc., Plaintiffs, v. United States of America and Interstate Commerce Commission, Defendants.	Civil Action. No. 644-65.
Amalgamated Transit Union, AFL-CIO, Plaintiff, v. United States of America and Interstate Commerce Commission, Defendants, American Buslines, Inc., National Association of Motor Bus Owners, Intervening Defendants.	Civil Action. No. 684-65.
International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Local Union 549, Plaintiffs, v. United States of America and Interstate Commerce Commission, Defendants, Overnite Transportation Company and Rutherford Freight Lines, Inc., Intervening Defendants.	Civil Action. No. 894-65.

Judgment.

This Court, having been duly constituted as a Three-Judge Statutory Court pursuant to 28 U. S. C., §§ 1336, 1398, 2284, 2321-2325, and having heard the parties on

brief and in oral argument and having entered its opinion of April 20, 1966, in these actions,

Orders, That the reports and orders of the Interstate Commerce Commission of which complaints are made in the above-entitled actions are hereby sustained, and that each of the above-entitled actions be, and they are hereby, dismissed.

This the 4th day of May, 1966.

/s/ .....
United States Circuit Judge.

/s/ .....
United States District Judge.

/s/ .....
United States District Judge.

APPENDIX C.

MF-2895

INTERSTATE COMMERCE COMMISSION.

No. MC-F-8393

OVERNITE TRANSPORTATION CO.—PURCHASE—
RUTHERFORD FREIGHT LINES, INC.

No. MC-F-8393[1]

OVERNITE TRANSPORTATION CO.—PURCHASE—
RUTHERFORD FREIGHT LINES, INC.

Decided July 31, 1964.

1. In No. MC-F-8393, purchase by Overnite Transportation Company of the operating rights and property of Rutherford Freight Lines, Inc., and acquisition by J. Harwood Cochrane of control of the operating rights and property through the purchase, approved and authorized, subject to conditions.

2. In Finance Docket No. 22555, authority granted Overnite Transportation Company to issue promissory notes in the aggregate principal amount of not to exceed $575,000.

William T. Croft and J. W. Alexander, Jr., for applicants.

Allen Post, Bates Block, Herbert S. Thatcher, and Hugh J. Beins, for protestants.

Report of the Commission,
Division 3, Commissioners Tuggle, Murphy, and Walrath.

Tuggle, Commissioner:

Exceptions to the report and recommended order by the examiner were filed jointly by International Brother-

[1] This report also embraces Finance Docket No. 22555, Overnite Transportation Company—Notes.

hood of Teamsters and Teamsters Local No. 549, hereinafter referred to as Union, and jointly by Georgia Highway Express, Inc., and B. C. Truck Lines, Inc., affiliated carriers hereinafter called Express and B. C., respectively, and applicants replied. A request for oral argument contained in Union's exceptions was denied by order of the Commission, Commissioner Tuggle, dated February 26, 1964.

Overnite Transportation Company, of Richmond, Va., and Rutherford Freight Lines, Inc., of Bristol, Va., by a joint application filed March 21, 1963, seek authority under section 5 of the Interstate Commerce Act for the purchase by the former of the operating rights and property of the latter and of two terminals owned by Roanoke Truck Depot, Inc., a non-carrier affiliate of vendor, hereinafter called Roanoke, for a base consideration of $1,250,000. J. Harwood Cochrane, also of Richmond, who controls vendee through management and ownership of 24.02 percent of its outstanding common capital stock, seeks authority under the same section to acquire control of the operating rights and property through the purchase transaction. Applicants operate in excess of 20 motor vehicles in interstate or foreign commerce.

By a separate application, filed April 8, 1963, vendee seeks authority under Section 214 of the act to issue three non-interest-bearing promissory notes in the aggregate principal amount not exceeding $575,000 to finance, in part, the proposed purchase transaction. No representation in respect thereto has been made by any State authority.

Hearing in the two proceedings has been held on a consolidated record at which they were opposed by the previously named protestants who introduced evidence. Briefs have been filed. Facts concerning the operations of applicants, their financial data, the terms and condi-

tions of the proposed transaction, and the operations of protestants are adequately set forth in the report of the examiner, are adopted as our own, and will be restated herein only to the extent found necessary for clarity.

Vendee and vendor are motor common carriers in interstate or foreign commerce, over regular and irregular routes, primarily of general commodities, with exceptions. Vendee's operations are over a network of regular routes extending generally from Richmond and Lynchburg, Va., on the north, to Atlanta and Savannah, Ga., on the south, and over irregular routes in an area embracing southern Virginia, eastern Tennessee, northwestern Georgia, western and central North Carolina, and all of South Carolina. Vendor's operations are over a network of regular routes extending from Richmond to Big Gap, Va., Bluefield, W. Va., Chattanooga, Tenn., Atlanta, and Greensboro, Raleigh, Erwin, and Charlotte, N. C. It also holds intrastate authority in Virginia and Tennessee. The routes of vendor are generally west of and complementary to those of vendee although some duplications do exist, for example, between Danville and Lynchburg, Va., over U. S. Highway 29, between Winston-Salem, N. C., and Monterey, Va., over U. S. Highway 52, and over U. S. Highway 70 between Greensboro and Burlington, N. C. Vendee would have no objection to elimination of route duplications in event the transaction is approved.

Under the Section 5 transaction vendee would acquire vendor's rights and properties, with certain exceptions as to the latter, for a consideration of $850,000, subject to adjustment upward or downward as certain notes may have been prepaid, plus an amount equal to vendor's liabilities less capital stock, surplus, and assets retained by vendor as of the date of consummation. Vendee also proposed to acquire two terminals of Roanoke for $400,000, and to employ two executives of vendor for 3 years at $15,000 per annum each. As of May 31, 1963, the ad-

justed purchase price would have been $1,826,922, of which $1,326,922 would have represented cash disbursements and $500,000 would have represented the aggregate of 3 non-interest-bearing notes, each payable in 72 monthly installments. Vendee should have little difficulty in meeting such obligations; however, our approval is conditioned that the total price shall not exceed $1,826,922, because of the possible inflation of vendor's liabilities which might be inversely proportional to its true net worth.

The examiner recommended that the applications be granted. He found that vendor has actively operated under its authority but that operating problems had arisen because of its deteriorating financial conditions; that it had operating losses of $94,000 in the first 5 months of 1963, its truckload traffic had decreased 30 percent over the same period in 1962, and efforts of its management to arrest the downward trend of its operations had been unsuccessful; and that the president of vendor was fearful it would become insolvent if the instant transaction were not approved. The examiner further found that vendee was a successful operator, with net income, after provision for income taxes, of $1,121,122, $1,558,247, and $637,054, for 1961, 1962, and the first 5 months of 1963; that vendee believed the unified rights could be used to advantage from the standpoint of service and economy; that vendor's equipment could be substantially improved, and savings could be effected through volume purchases, joint solicitation, in claims and adjustments, and reduced administrative costs; and that vendee estimated that operations under the combined rights would result in increase in annual net income of $131,838, or earnings on its investment of 11 to 12 percent. In respect to protestants, the examiner found that the unification might result in some traffic adjustment in the area served by the unified operations but that the record as a whole did not show that protestants would be adversely affected to

any material extent. In respect to employees, the examiner found that the transaction would result in the displacement of some 92 of the 224 employees of vendor, and that specific provisions should be imposed for their protection, citing, in support thereof, **Short Line, Inc.—Purchase—New England Transp. Co.**, 75 M. C. C. 33, and **Baggett Transp. Co.—Purchase—Hunt Freight Lines, Inc.**, 75 M. C. C. 147. Pursuant thereto, he imposed a condition providing that any employee of vendor displaced by the transaction should receive, for a period not exceeding 3 months, severance pay at the rate of his average monthly pay for the 12 months immediately preceding the month in which he was discharged, reduced by the amount of other compensation or wages received from other sources during the 3-month period.

In their exceptions, the protestant motor carriers assert that the examiner erred in failing to find that the authority of vendor at intermediate points on the regular routes between Atlanta and Knoxville, via Chattanooga, was dormant, and that such intermediate-points authority should be canceled as a condition to approval of the application. Protestants contend that the evidence of record clearly reveals that the service performed by vendor at such points was limited to a few volume movements with other service rendered only via interchange with other carriers. They assert that traffic at such intermediate points is vital to Express and that this carrier would be adversely affected if the transaction were approved and vendee permitted to institute an aggressive operation at such points.

In its exceptions Union argues that the principal issues presented by the proceedings are (1) whether the applications should be denied because the public interest would not be served by permitting an applicant such as vendee, with an alleged anti-union record, to acquire an already unionized operation, or (2) whether, in the alternative,

if the applications were granted, specific conditions should be imposed to protect the job rights and job interests of the employees of vendor, and what form such conditions should take. It argues that the examiner erred in rejecting evidence respecting vendee's anti-labor record as reflected in various proceedings before the National Labor Relations Board (NLRB); in failing to find that the adversely affected employees of vendor were entitled to protective provisions similar to those afforded railroad employees under identical circumstances; in failing to find that the employees of vendor, particularly those at the terminals at Bristol and Roanoke, Va., were desirous of retaining their union representation; and in not requiring vendee to recognize both the union and the terms of the existing collective agreement to which Union is a party at the indicated terminals.

Union contends that the transaction should be denied or more adequate conditions imposed for the protection of adversely affected employees; that the inevitability of interruptions to operations because of labor strife is a factor which this Commission has regarded as significant in deciding applications; that, even if vendor is forced out of business because of deficit operations, there is no showing that the public will be inconvenienced thereby; that, if necessary to permit vendor to remain in business and as an alternative which the employees of vendor are willing to accept, Union is willing to negotiate with vendor respecting a reduction in labor costs. Union states that, while Section 5 (2) (c) of the act is not as specific as Section 5 (2) (f) respecting railroad employees, the Commission in the **Short Line** case, previously cited, stated that "public policy demands fair and equitable treatment of employees of motor carriers"; that in **Amalgamated Assn. of Street, Elec. Ry v. United States**, 221 F. Supp. 958 (1963), hereinafter called the **American Buslines** case, the Court stated that failure to accord motor carrier employees the same protection as railroad em-

ployees in similar situations should not occur without a reasoned explanation, which has not been done in this case; and that because vendee has indicated it does not propose to effect any changes in the duties of the drivers and the supervisory personnel at Bristol and Roanoke, and because the employer acquired is unionized, under principles of labor law and vendor's contract with Union, the acquiring carrier is obliged to recognize the union and the existing collective bargaining agreement.

In reply to the exceptions of the motor carrier protestants, applicants contend that a carrier is not required to submit evidence of operations to and from every point on its authorized routes in order to show continuous and substantial operations, citing, among others, **Mid-Continent Frt. Lines, Inc.—Purchase—Hanson M. Exp.**, 65 M. C. C. 312, and **Frank Cosgrove Transp. Co., Inc.—Pur.—Dawne Transp. Co.**, 80 M. C. C. 191; that the contention of protestants that the evidence of applicants shows only 69 shipments to and from the intermediate points on the routes between Atlanta, Chattanooga, and Knoxville is erroneous, as the evidence discloses the transportation of 93 shipments which moved to and from such points in a 6-day period, of which vendor originated 6 and delivered 9; that other evidence indicates that in the last 6 months of 1962 vendor delivered 74 shipments to 11 intermediate points on such routes; and that the mere fact that vendor on occasions found it more economical and expedient to turn shipments over to other carriers for delivery does not warrant a finding that the rights involved are dormant.

In reply to the exceptions of Union, applicants contend that disapproval of the applications herein, not only would result in financial disaster for vendor and loss of service to the public but loss of employment to all employees of vendor; that Union evidently would prefer to sacrifice the jobs of all employees of vendor rather than see vendee, a non-union carrier, expand its operations;

that the legislative history of Sections 5 (2) (c) and 5 (2) (f) clearly indicates the intent to give railroad employees greater protection than that afforded employees of motor carriers, any protection afforded motor carrier employees being discretionary with the Commission; that motor carriers, being smaller than rail carriers, are financially unable to pay equivalent protective costs; that rail employees, as a rule, are highly specialized, unlike employees of motor carriers; and that, considering all circumstances, including the fact that the conditions imposed by the examiner will cost in excess of $100,000, the affected employees of vendor will be adequately protected and the imposition of further conditions could imperil consummation. Applicants will accept the examiner's proposed conditions.

Applicants represent that offers of employment by vendee to employees of vendor will be made on the basis of seniority, that vendor's employees will be treated as if their service had been with vendee, that reasonable moving expense allowances will be made for those employees transferred to other locations, that the length of service of the employees of vendor with that carrier will count toward their starting pay with vendee, that ages of employees will not be considered as a cause for rejection, that vendee will attempt to persuade its insurance company to allow the selected employees of vendor to enjoy hospital, medical, and life insurance benefits without the usual 30-day waiting period, that vendee does not "lay-off" full-time employees for lack of work and reduction in the work force during slack periods would be based on attrition, and that in matters relating to advancement, demotion, layoff recalls, and the filling of vacancies, vendee first will consider the qualifications of the applicants and, other things being equal, seniority will control. Vendee, however, does not commit itself to "bump" any of its existing employees for more senior employees of vendor. It further contends that payment

of severance pay should not be required for those former employees of vendor who are already in a "lay-off" status and are merely retained on the rolls of vendor due to its agreement with Union, and asserts that the transaction should be approved subject to the condition that only these employees of vendor who are separated or displaced as a direct result of the transaction are entitled to protection.

In respect to the contention that vendee should be required to conform to the collective bargaining agreement now existing between Union and vendor, vendee asserts that the question is not before the Commission of whether it should recognize Union as representative of future employees in a legally established and appropriate bargaining unit; that the question of whether vendee, as a successor company to vendor, should be required to recognize and bargain with Union is reserved to the NLRB; that none of the cases cited by Union supports a requirement of assumption of union contracts nor has any case been found where a Federal Court or Agency has held that a bona fide purchaser of assets is bound by a union contract of vendor; and that the cases that do deal with this subject are contrary to the contentions of Union.

Discussion and Conclusions.

As previously stated, the motor carrier protestants contend that rights of vendor at the intermediate points between Atlanta and Knoxville, via Chattanooga, should be canceled for dormancy. In this respect, the evidence indicates that vendor's service between the three main points has consisted of at least one round trip daily in each direction, and that additional schedules, including peddle runs, have been added on occasions. Vendor asserts that it has actively solicited traffic for movement to and from all points located on the said route, and points out that some of its difficulty has been due to the fact that with the exception of Cleveland, Tenn., it holds

only interstate authority over the route between Knoxville and Atlanta. The principal points on such route, and their population as shown in the 1963 Rand-McNally Road Atlas, other than the three main points, are, in Tennessee, Lenoir City (4,979), Loudon (3,812), Sweetwater (4,145), Athens (12,102), and Cleveland (16,196), and, in Georgia, Dalton (17,868), Calhoun (3,587), Cartersville (8,668), and Marietta (25,565). In respect to the transportation performed to and from such points, the evidence discloses that between July 1 and December 31, 1962, vendor delivered some 76 shipments at such intermediate points, with service performed at all points except Marietta. No outbound shipments are shown, vendor asserting that they would be difficult to ascertain because of the method used in maintaining its records but that they would approximate 25 percent of the inbound shipments.

While it is clear that vendor's activity at the said intermediate points has been substantially less active than at other points it is authorized to serve, it is our opinion that the service performed, although limited, is sufficient to warrant a finding that the intermediate-point rights are not dormant. Vendee probably will be more aggressive in seeking business at the intermediate points if the application is approved. However, the evidence will not support a finding that this foreseeable increase in competition will be sufficient to affect detrimentally the operations of the protestant carriers. Perhaps Express may lose some traffic, as indicated by the examiner, and this often occurs where a stronger and more aggressive carrier takes over the operations of a less stable carrier, as here, but this factor is not sufficient by itself to justify a finding that the application should be denied, that service at the intermediate points should be canceled, or that some restriction should be placed upon the service vendee can render at such points under the unification. Compare **Consolidated Copperstate Lines—Pur.—Sunset M.**

Lines, 85 M. C. C. 113. Any restriction on the authority, precluding service at the intermediate points, or any cancellation of authority at such points, would create unnecessary operating problems and would not be in the public interest.

In respect to applications filed under Section 5 (2) of the act, "the interest of the carrier employees" is only one of the matter we consider in determining whether approval of an application would be consistent with the public interest. In administering the provisions of 5 (2), we are guided also by consideration of the adequacy of transportation service, of its essential conditions of economy and efficiency, and of appropriate and best use of transportation facilities. The public interest is paramount in considering applications filed under such section, with "public" referring to all persons affected by carrier operations and not to one group of such persons to the exclusion of others.

In our opinion, a finding that the public interest would not be served by permitting vendee, a non-union carrier, to acquire the operations and facilities of vendor, a unionized carrier, because vendee may have participated in some anti-union activity in the past, and is thereby "unfit," even if such activity were proven, would not be justified. The facts that efforts to unionize vendee may have been unsuccessful, that it proposes to retain its non-union status, and that it here seeks to acquire a unionized carrier are no bases for finding that the public interest would be adversely affected, that vendee's employees have been adversely affected in the past, or that approval of the application would result in future adverse effect upon its employees.

On the other hand, were we persuaded this transaction was repugnant to the national labor policy, we would be hesitant to approve it. We have, however, considered the allegations of the union in this regard and viewing

the matter in a light most favorable to it, have considered the material presented in its offer of proof, yet conclude these facts do not bar our approval of this application.

The contention that approval of the application may lead to labor difficulties and disruption of vendee's operations as well as further violations of the national labor policy is conjectural. In any event, vendee cannot guarantee labor peace even if it were to recognize the union. Furthermore, such possibility does not warrant withholding approval of the application when it otherwise appears that the public would benefit and that it would foster the appropriate and efficient use of the transportation facilities involved. The further contention of Union that if the application should be approved vendee should be required to recognize and conform to the collective bargaining agreement between vendor and Union at the two terminals sought to be acquired from Roanoke, and that, inasmuch as the agreement contained a successor clause and vendee had knowledge thereof, it is bound thereby, is not a matter for our determination. Compare **Baggett Transp. Co.—Purchase—Hunt Freight Lines, Inc.**, 70 M. C. C. 169, 75 M. C. C. 147, and 87 M. C. C. 235. In his report, the examiner concluded that the Commission should make no finding or recommendation with respect to the labor relations problems, citing, in support thereof, **Burlington Truck Lines v. United States**, 371 U. S. 156 (1962), the same case cited by Union in support of its contention that accommodation to the national labor policy by the Commission requires denial of the application. As stated by the Supreme Court in that proceeding, in reference to the Commission and the NLRB (page 173), "If either agency is not careful it may trench upon the other's jurisdiction, and because of lack of expert competence, contravene the national policy as to transportation or labor relations." We concur in the conclusion of the examiner.

In any event, in view of vendor's declining traffic and revenues and the resulting trend toward substantial deficits which, if continued, will result only in its demise as a carrier, we cannot determine how denial of the instant application could be considered to be consistent with the overall public interest, including that of all of vendor's employees. We believe it would be imprudent to give any weight to Union's offer that, if necessary to permit vendor to stay in business, it is prepared to negotiate the lessening of its labor costs. No explanation is submitted as to how the necessary reduction could be accomplished, how this would alleviate vendor's financial condition or restore its declining traffic and revenues, or why, if Union were aware of these problems, it was not attempted prior to commencement of the instant proceeding. Though it is somewhat conjectural, considering the carrier's operating losses in the first 5 months of 1962, any labor-costs reduction permitting vendor to continue in business presumably would require the lowering of the existing wage scale or the elimination of the jobs of some employees. Such savings also must be based on the premise that vendor's present level of operating efficiency can be maintained or improved. There is no showing that both could be accomplished.

Under subparagraphs (c) and (f) of paragraph (2) of Section 5 of the act, it is provided, as pertinent, that:

> (c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: * * * (4) the interest of the carrier employees affected.
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> * * * * * * * *
>
> (f) As a condition to its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the rail-

> **road** employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by **railroad** affected by such order being in a worse position with respect to their employment, * * * [Emphasis supplied].

Although Congress, in compelling us to consider "the interest of carrier employees affected" in Section 5 (2) (c), may well have had in mind such factors as protective conditions for employees of motor carriers, an analysis of the legislative history as well as the explicit language of Section 5 (2) (f) above, clearly shows that the Congressional mandate for the imposition of protective conditions for employees, particularly the 4-year provisions, applies only to employees of rail carriers affected by a transaction, and that the amount of protection which must be afforded employees of motor carriers, if any, pursuant to the provisions of Section 5 (2) (c) above, is not subject to any fixed formula and must be based on the circumstances existing in any particular case. Compare **Short Line, Inc.—Purchase—New England Transp. Co.**, *supra*, and **Baggett Transp. Co.—Purchase—Hunt Freight Lines, Inc.**, *supra*.

Regarding Commission decisions pertaining to motor carrier employees, the Commission in the **Short Line** case, *supra*, did state that "* * * the Act, taken as a whole, makes clear the congressional intent that public policy demands fair and equitable treatment of employees of motor carriers. * * *." On the other hand, contrary to the contention of Union, the Commission in that case did not establish any principle to the effect that motor carrier employees should be afforded the same protection that is accorded the employees of railroads. In the **American Buslines** case, the District Court also did not indicate that the Commission was bound to apply the mandatory

provisions of Section 5 (2) (f) of the act to motor carrier employees, stating, in its decision, that "We need not here attempt to delineate what measure of relief, if any, should be provided to the employees of American Buslines, Inc." and further "But we think that if any particular measure of relief is one which would ordinarily be granted to railroad workers similarly situated, the Commission should not deny it to the employees of American Buslines, Inc., without a reasoned explanation of its denial, * * *."

In the first place, as previously noted, the law does not require that provisions for the protection of motor carrier employees be imposed. In addition, the skills of motor carrier employees are more adaptable than the more technical and limited skills of most railroad employees. Motor carrier maintenance employees are more readily absorbed into maintenance work in garages and similar establishments, truck drivers are employable in numerous industries in addition to motor carrier operations, and clerical workers are readily absorbed into industry. Even employees with more technical skills are more readily absorbed into the expanding trucking, bus, and public automobile businesses. The rail transportation industry, on the other hand, is unique in that it generally has a full complement of employees with very few openings for new employees. The trend toward fewer operating rail employees is one of public knowledge. Displaced rail employees, therefore, would encounter more difficulty in securing similar positions and consequently, need more protection from adverse effect than do motor carrier employees.

The majority of the approximately 18,500 motor carriers regulated by this Commission are considerably smaller than a majority of the railroads. The motor carriers, as a rule, do not have substantial resources, are subject to greater competition, have high operating ratios, and generally do

not have the capacity to absorb any substantial or long-term compensation awards.[2] Many motor carriers dispose of their rights and properties only because they are financially unable to continue their service to the public. Imposition of protective conditions, in such instances, often would defeat or impede the transfer and possibly result in adverse effects to service under the operating rights and to the public. In addition, it is clear that if such unifications are not authorized, the result may be the demise of the weaker carriers as well as the loss of all jobs of their employees. The question then is one of what is fairest, considering both employee and carrier interests. It should be noted that even in rail proceedings, where total abandonment of the rail lines is proposed, the Commission usually has not imposed conditions for the protection of employees affected by the abandonment. See **Rutland Ry. Corp. Abandonment of Entire Line**, 317 I. C. C. 393, affirmed in **Brotherhood of Locomotive Engineers v. United States**, 217 F. Supp. 98 (1963).

In our opinion, it is clear that if Congress intended that employees of motor carriers be afforded the same protection as that afforded employees of railroads, under transactions such as involved herein, it would not have made the provisions of section 5 (2) (f) mandatory and the provisions of section 5 (2) (c) discretionary with the Commission. In view of such discretion, the question presented is whether, under the circumstances presented, the condition proposed by the hearing examiner in this proceeding is just, reasonable, and adequate. We conclude that it is. It provides benefits to dismissed employees for a long enough period that aggressive job-hunting should be successful without imposing such a burden on vendee as to imperil its financial stability or as to preclude consummation. Such condition, which we adopt as somewhat modified, is set forth in the findings herein.

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[2] We recognize that vendee here is neither small nor unprofitable.

Inasmuch as some of the employees of vendee may be dismissed to make room for employees of vendor that may be employed by vendee, the condition imposed will be considered as applying to the current employees of both carriers. Any person previously employed by either carrier and in a layoff status on the date of service of the order herein, and who has been in such status for a period of at least 6 months prior thereto, shall not be deemed to be an employee of either carrier on such date and thereby is not entitled to the benefits of the protective condition. Our findings also will provide for arbitration of any dispute or controversy respecting the application of the protective condition.

In No. MC-F-8393, we find that the purchase by Overnite Transportation Company of the operating rights and property of Rutherford Freight Lines, Inc., and acquisition by J. Harwood Cochrane of control of the operating rights and property through the purchase, upon the terms and conditions set forth herein and in the report of the examiner, which terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5 (2) (a) and will be consistent with the public interest, and that, if the authority herein granted is exercised, Overnite Transportation Company will be entitled to operate under the rights granted in Nos. MC-60875 and MC-60875 (Sub-Nos. 1, 3, 4, 9, 11, 12, 13, 14, and 16), which rights are herein authorized to be unified with rights otherwise confirmed in Overnite Transportation Company, and to be embraced in a certificate to be issued in its name, with duplications eliminated; provided, however, that the transaction herein authorized shall be subject to the following condition:

Any employee of Rutherford Freight Lines, Inc., or Overnite Transportation Company, separated from his employment with either carrier as a result of, or in anticipation of, consummation of the transaction

herein, shall receive, for a period of not more than 3 months, severance pay, paid by Overnite Transportation Company, at the rate of his average monthly pay for the 12 months immediately preceding the month in which he was discharged, said payments to be reduced by the amount of the total wages earned during the period in which he otherwise was employed during the 3 months, including any unemployment benefit payments. In the event of any dispute or controversy arising with respect to the protection afforded by said condition, which cannot be settled by Overnite Transportation Co., and the employee, or his authorized representative, within 30 days after the controversy arises, may be referred by either party to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedures, expenses, et cetera, to be agreed upon by the carrier and the employee, or his duly authorized representative.

In Finance Docket No. 22555, we find that the issuance by Overnite Transportation Company of three non-interest-bearing promissory notes, each payable in 72 equal consecutive monthly installments from the date of consummation, (1) to Rutherford Freight Lines, Inc., in a principal amount not to exceed $250,000, (2) to Decatur Cartage Company, in a principal amount not to exceed $125,000, and (3) to Texas Leasing Company, in a principal amount not to exceed $200,000, (a) is for a lawful object within its corporate purposes and compatible with the public interest, which is necessary and appropriate for, and consistent with, the proper performance by it of service to the public as a common carrier, and will not impair its ability to perform that service, and (b) is necessary and appropriate for such purposes.

An appropriate order will be entered.

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IN THE

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OCTOBER TERM, 1966

No. 497

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA AND LOCAL UNION 549, *Appellants,*

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees,*

OVERNITE TRANSPORTATION COMPANY AND RUTHERFORD FREIGHT LINES, INC., *Intervening Appellees.*

On Appeal From a Decision of a Three-Judge United States District Court for the District of Columbia

MOTION TO AFFIRM

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MOTION TO AFFIRM

Come now Overnite Transportation Company and Rutherford Freight Lines, Inc., intervening appellees and, pursuant to Rule 16, Paragraph 1(c) of the Revised Rules of this Court, move that the judgment of the District Court be affirmed.

STATEMENT OF CASE

This is a direct appeal from a final judgment of a three-judge District Court convened pursuant to 28 U.S.C. §§ 2284 and 2325. The District Court dismissed appellants' action to set aside an order of the Interstate Commerce Commission entered in No. MC-FC-8393, *Overnite Transportation Co. — Purchase — Rutherford Freight Lines,* 97 M.C.C. 568, whereby the Commission authorized the purchase by Overnite Transportation Company of all the interstate operating authority and physical properties of Rutherford Freight Lines subject to the condition that any employee of either carrier separated from his employment as a result of consummation of the approved transaction should receive, for not more than three months, severance pay at the rate of his average monthly pay for the twelve months immediately preceding the month in which he was discharged.

STATUTES INVOLVED

The statute involved is Section 5 of the Interstate Commerce Act, 49 U.S.C. § 5 particularly Paragraph (2) and subparagraphs (c) and (f) thereof.

Paragraph 5(2)(c) requires the Commission in passing on any proposed transaction to give weight to various considerations including ". . . (4) the interest of the carrier employees affected".

Paragraph 5(2)(f) further declares that in approving "any transaction involving a carrier or carriers *by railroad*" the Commission "shall require a fair and equitable arrangement to protect the interest of the *railroad* employees affected". The same subsection further provides that "In its order of approval, the

Commission shall include terms and conditions providing that during the period of four years from the effective date of such order, such transaction will not result in emplyoees of the carrier or carriers *by railroad* affected by such order being in a worse position with respect to their employment * * *" (Emphasis added).

ISSUE PRESENTED

The sole issue presented is whether the Commission in approving the acquisition by one motor carrier of another motor carrier and having due regard for "the interest of the carrier employees affected" as required by Paragraph 5(2)(c), is legally bound to impose employee-protective conditions guaranteeing to adversely affected motor carrier employees the *same* measure of protection as they would be entitled to under Paragraph 5(2)(f) if they were railroad employees. In *Amalgamated Association of Street, Electric Railway and Motor Coach Employees, et cetera,* v. *U. S.,* 221 F. Supp. 959, the same District Court from which the present appeal is taken, found that the Commission *had no such obligation* provided it gave a "reasoned explanation" of its failure to do so. In its decision approving and authorizing Overnite's acquisition of Rutherford, the Commission, being cognizant of the Court's decision in the *Amalgamated* case (which it refers to as the *American Buslines* case), very carefully supplied the "reasoned explanation" required of it, saying:

> "In the *American Buslines* case, the District Court also did not indicate that the Commission was bound to apply the mandatory provisions of section 5(2)(f) of the act to motor carrier employees, stating, in its decision, that 'We need not here attempt to delineate what measure of relief, if any,

should be provided to the employees of American Buslines, Inc.' and further 'But we think that if any particular measure of relief is one which would ordinarily be granted to railroad workers similarly situated, the Commission should not deny it to the employees of American Buslines, Inc., without a *reasoned explanation* of its denial, * * *.'

"In the first place, as previously noted, the law does not require that provisions for the protection of motor carrier employees be imposed. In addition, the skills of motor carrier employees are more adaptable than the more technical and limited skills of most railroad employees. Motor carrier maintenance employees are more readily absorbed into maintenance work in garages and similar establishments, truck drivers are employable in numerous industries in addition to motor carrier operations, and clerical workers are readily absorbed into industry. Even employees with more technical skills are more readily absorbed into the expanding trucking, bus, and public automobile businesses. The rail transportation industry, on the other hand, is unique in that it generally has a full complement of employees with very few openings for new employees. The trend toward fewer operating rail employees is one of public knowledge. Displaced rail employees, therefore, would encounter more difficulty in securing similar positions and consequently, need more protection from adverse effect than do motor carrier employees." (Emphasis added)

DISTRICT COURT'S DECISION

The District Court (which, as stated, is the same Court as laid down the "reasoned explanation" doctrine in the *Amalgamated* or *American Bus Lines* case) declared that appellants' action in bringing the *Overnite* case "is an attempt to reargue the legal issues

presented in the first appeal of the *Amalgamated* case". Adhering to its holding in the *Amalgamated* case, the District Court declared (see Jurisdictional Statement, Appendix A, pages 36 and 37):

> "Motor carrier employees *do not need very much financial protection* from the adverse effects of Section 5 transactions, for they move in an expanding industry and possess quite a degree of transferability within the industry itself. We also agree with the Commission that 'the skills of motor carrier employees are more adaptible (sic) than the more technical and limited skills of most railroad employees'. Displaced railroad employees meet with more difficulties in obtaining similar positions and, therefore, they need more protection than do motor carrier employees.

> "The standard of fair and equitable protection which the Commission must grant to motor carrier employees *will not be found in the standard established for railroad employees.* While Section 5(2)(f) of the Act requires certain minimum financial protection over a period of four years to railroad employees, no such requirement has ever been enacted by the Congress for motor carrier employees. In the railroad cases, the minimum protection is prescribed by the statute, and discretion is given only to increase such protection, *while in the motor carrier cases, no minimum is prescribed by the statute, for the statute only grants a discretion to award protection to motor carrier employees that is fair and equitable.*

> "The Commission was not required to follow the mandate of the Congress regarding the minimum protection granted railroad employees as a guide to the minimum protection for motor carrier emlpoyees. We cannot say that, under the circumstances of these cases, the motor carriers' employees involved are so similarly situated to railroad

employees as to entitle them to more protection than the Commission has awarded them.

"We hold, therefore, that the policy of the Interstate Commerce Commission to protect employees affected by financial transactions between motor carriers differently from employees where railroads are involved is supported by a rational basis and is authorized by the statute.

* * * * * * * * *

"We hold, therefore, that the protection given to motor employees of the two proceedings before the Court is fair and equitable to both the employees and the involved motor carriers." (Emphasis added)

LEGISLATIVE HISTORY

The conclusion of the District Court first in the *Amalgamated* case and later here that under §§ 5(2)(c) and (f) motor carrier employees are not as a matter of law entitled to the same protection as railroad employees is firmly supported by the legislative history of the two sections. For the convenience of the Court, that history is set forth in the Appendix hereto.

"REASONED EXPLANATION"

The District Court's further conclusion that the Commission, following its mandate in the *Amalgamated* case, had made an adequate "reasoned explanation" of its decision is patently sound. Specifically, the Commission found in effect as follows:

1. That the skills of motor carrier employees are more adaptable (more readily saleable) than the more technical and specialized skills of railroad employees.

2. That motor carrier maintenance employees are more readily (than railroad employees) absorbed

into maintenance work in garages and similar establishments.

3. That truck drivers are employable in numerous non-carrier industries.

4. That motor carrier clerical workers are readily absorbed into industry.

5. That truck, bus, and public automobile businesses are expanding and can absorb motor carrier employees more readily than railroad employees.

6. That rail transportation is unique in that it is contracting and generally has a full complement of employees.

7. That separated railroad employees would encounter more difficulty (than motor carrier employees) in securing similar new positions.

8. That separated railroad employees need more protection than do motor carrier employees.

9. That motor carriers as a rule do not have substantial resources with which to pay separated employees.

10. That motor carriers as a rule are subject to greater competition which limits their capacity to pay.

11. That motor carriers as a rule have high operating ratios.

12. That motor carriers as a rule do not have the capacity to absorb substantial or long-term compensation awards.

13. That motor carriers frequently dispose of their operating rights and properties *only* because they are financially unable to continue service to the public.

14. That imposition of employee-protection conditions in such cases would defeat or impede the

transfer with adverse effects on the service to the public,

15. That unifications defeated by onerous employee-protection conditions are likely to result in the demise of the weaker carriers with total loss of their jobs to employees.

16. That in railroad total abandonment cases (comparable to transfers of virtually bankrupt motor carriers) employee-protection conditions are not usually imposed.

17. That in view of the different language found in Section 5(2)(c) and sub-paragraph (f), Congress did not intend that motor carrier employees should receive the same protection as railroad employees.

CONCLUSION

The issue in this case is simple. Accepting the admonition in the *Amalgamated* case that it should give a "reasoned explanation" of any failure to accord motor carrier employees the same measure of protection required by the statute in the case of railroad employees, the Commission did so abundantly. No more than this is required. The terms of the statute are clear and consistent with the legislative intent. The District Court's decision is correct and no substantial question worthy of this Court's attention is presented by the

appeal. It is respectfully submitted that the judgment of the District Court should be affirmed.

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APPENDIX

Legislative History of Sections 5(2)(c) and (f)

Prior to enactment of the Motor Carrier Act, 1935 (now Part II of the Interstate Commerce Act), section 5(4) of the Interstate Commerce Act dealing with consolidations of railroads, required only that the Commission, before granting an application for approval, find that the proposed transaction would "promote the public interest." It contained no specific requirement that consideration be given to the interests of employees. Nevertheless, the Commission in *St. Paul Bridge & Terminal Ry. Co.—Control,* 199 I.C.C. 588, 595 (1934) found that the "public interest" embraces the interests of employees and that its approval of a proposed transaction could properly be coupled with reasonable requirements (conditions) imposed in the interests of employees. Following this decision, in January, 1935, former Commissioner Eastman, then Federal Coordinator of Transportation, recommended legislation providing for dismissal compensation for railroad employees displaced through coordination projects. H. D. No. 89, 74 Congress 1st session.

Thus, when the Motor Carrier Act, 1935, ultimately approved August 9, 1935, was before the Congress, that body was undoubtedly cognizant of both the *St. Paul Bridge* case and the Coordinator's recommendation respecting railroad employees. It did not, however, incorporate in the new Motor Carrier Act, as adopted, any provision whatsoever respecting employees adversely affected by motor carrier consolidations or mergers. Section 213 of that Act made purchases, consolidations and mergers of motor carriers subject to Commission approval but required only that such approval be based on a finding that a proposed transaction would be "consistent with the public interest" and made no specific mention of the interests of carrier employees. When 213 was before the House, Congressman

Sadowski, explaining what was meant by "consistent with public interest," ignored completely both the *St. Paul Bridge* case and the interest of carrier employees, indicating that the sole concern of the framers of the bill was the possibility of motor carrier control getting "into the hands of competing forms of transportation, who might use the control as a means to strangle, curtail or hinder." 79 Cong. Rec. 12206.

Several months after adoption of the Motor Carrier Act of 1935, the Commission in its 1935 annual report to the Congress recommended legislation to protect employees from undue loss as a consequence of *railroad* abandonments and acquisitions. A similar recommendation was made in its annual report for 1936. In addition, the Federal Coordinator in January 1936 and again in March 1936 also renewed his recommendation of legislation providing for dismissal compensation to protect *railroad* employees. H.D. No. 394, 74 Congress, 2d session.

Against this background of reports and recommendations designed to protect railroad employees from undue losses in connection with *railroad* consolidations, the bill, S 2009, which ultimately became the Transportation Act, 1940 (54 St. 898) came on for consideration by the Congress. As significant here, it ended with the repeal of former Section 213 and the incorporation of the substance thereof in what is now Section 5 of the Act including the adoption of subparagraphs (2)(c) and (2)(f) with their *radically different* provisions respecting the protection to be accorded carrier employees in the event of consolidations, mergers, etc.

Other than the *St. Paul Bridge* case and the various reports to Congress of the Commission and the Federal Coordinator already mentioned, the history of paragraphs (2)(c) and (2)(f) begins in September 1938 when the President appointed a special "Committee of Six" to consider transportation problems and recommend legisla-

tion.[1] This Committee, composed of three members representing railroad management and three members representing railroad labor, recommended among other things the complete revision of section 5. More specifically, it proposed a requirement that before any proposed consolidation be made effective approval be obtained from a proposed Transportation Board. Approval or disapproval by the Board of a proposed consolidation was to be based on four listed considerations, among which was the interests of the employees affected. The Committee report at page 32 provided that:

> "* * * The Board shall examine into the probable results of the proposed consolidation and require, as a prerequisite to its approval, a fair and equitable arrangement to protect the interests of the said employees."

A proposed bill prepared by the Committee of Six contained the following pertinent provisions:

> "(c) In passing upon any proposed transaction * * *, the Commission shall give weight to the following considerations, among others: * * * and (4) the interest of the carrier employees affected
>
> "(d) * * * The Commission shall require, as a prerequisite to its approval of the proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected."

S. 2009 included in Section 49(3)(b)(4) the same provisions for the protection of employees as recommended by the Committee of Six.[2] As drafted, Sections 49(3)(b)(4)

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[1] Report of the Committee to the President (December 28, 1938) at p. 1, reprinted in Hearing on H.R. 2531 and 4862 before the House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess., pp. 257-308.

[2] See S. Report No. 433, 76th Congress, 1st Session.

and 49(3)(c) applied to employees of *all* carriers under the Act. In the Senate hearings on the bill, Commissioner Eastman testified:[3]

> "Concerning unification of carriers: Section 49 of S. 2009 contains provisions applicable to unifications of all types of carriers. Paragraph (c) provides, among other things, that the Commission 'shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected.' This was taken from the recommendations of the Committee of Six with reference to railroad unifications, but as included in Section 49 it relates to unification of motor or water carriers as well.
>
> "Purchases or other unifications of motor-carrier properties occur very frequently, and the Commission authorizes many such transactions every month. Many of them are very small affairs and often they involve only a purchase of operating rights. It is important that they be handled rapidly for the vendor often sells because he is no longer able financially to continue operation. We have had no demands for protection, of employees in connection with such transactions, nor any evidence that protection is needed, and it is probable that in many instances it would be difficult to formulate any feasible plan of protection. The principle of protection I believe to be sound, and we should have authority to require it where a reasonable need therefor is shown. However, I do not believe that a plan for such protection should rigidly be made a 'prerequisite' to our approval of any proposed transaction, reguardless of the circumstances and the evidence."

In reporting the bill with certain amendments, the Senate Committee, nevertheless, included the original language requiring, as a prerequisite to approval of any proposed

---

[3] Hearings on S. 1310 before the Senate Committee on Interstate Commerce, 76th Cong., 1st Sess., at 793 (1939).

acquisition or consolidation, a fair and equitable arrangement to protect the interest of the employees affected, and in this form the bill passed the Senate.

Insofar as employee protection is concerned, S. 2009 came before the House of Representatives in the form passed by the Senate, and as here pertinent provided: (see 84 Cong. Record 9881)

> "Sec. 5(2)(c). In passing on any proposed transaction under the provisions of this section, the Commission shall give weight to the following considerations, among others: . . . (4) where appropriate, the interest of the carrier employees affected.
>
> • • • • • • • • • •
>
> (e) . . . the Commission shall require, as a prerequisite to its approval of any proposed transaction, a fair and equitable arrangement to protect the interests of the employees affected."

Representative Harrington offered the following amendment to Section 5(2)(3) (84 Cong. Record 9882):

> ". . . after the word 'affected', substitute a comma for the period and add the following 'Provided, however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees.'"

The purpose of this amendment was to safeguard *railroad* labor. (84 Cong. Record 9882). The House debates unanimously favored the amendment to help *railroad* labor (See id. at 9882-9887) and the Harrington amendment was agreed to.

Thereafter, in a letter to both House and Senate Committees on Interstate Commerce concerning the Omnibus Transportation Legislation, S. 2009, as passed by both Houses of Congress, former Commissioner Eastman, as

Chairman of the Legislative Committee of the Interstate Commerce Commission, again renewed the Commission's *objection* to the mandatory requirements of the bill particularly *as applied to employees of motor carriers* and recommended the following amendment to the employee protective provisions of the proposed Section 5(2)(e) which included as a proviso, the Harrington amendment:[4]

> "In line 2, page 211 [of the July 26, 1939 bill], insert after 'shall' the words 'have authority to', and in lines 5-10 strike out the proviso. A large portion of motor carrier unifications involve the absorption of *failing lines.* Often the acquiring carrier is seeking only to obtain operating rights and is not interested in the operations of the other carrier as a going concern. The requirement that we impose a condition for the protection of employees, to say nothing of the proviso in lines 5-10 [the Harrington Amendment], would therefore *have the effect of prohibiting many such transactions. Very often this would not benefit the employees, for unless acquired by some other carrier, the line for which they are working will die.* It would, however, penalize the owners of the operating rights. We think it wiser to make the authority discretionary rather than mandatory.
>
> "As for the proviso, the object of unifications is to save expense, usually by the saving of labor. Employees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called 'Washington Agreement' of 1936 between the railroad managements and labor organizations. The proviso, by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees. In these days of intense competition from other forms of transportation, the railroads must, if they are to thrive and grow, conduct their operations with the utmost possible economy and efficiency. If they are

[4] Letter of January 29, 1940, page 67 (Committee Print of the House Committee on Interstate and Foreign Commerce, 76th Cong., 3d Session).

prevented from doing this, further shrinkage of operations and continuing loss of employment are inevitable."

The Conference Committee in apparent deference to the Commission's view struck from the bill all references to Section 5, including the new labor provisions (see House Rep. 2016, 76th Cong., 3d Sess.) but the House refused to accept S. 2009 as so reported. With respect to the Harrington amendment, the debates in the House clearly indicate that the concern was for the protection of *railroad* employees. (86 Cong. Record 1260-1264, 2236-2238, 5869-5871, 5878-5882). The bill was recommitted to the Conference Committee with instructions that the managers on the part of the House insist on the inclusion of the consolidation provisions but modified to limit the Harrington amendment to employees of railroads.[5] (86 Cong. Record 5886). The House instructions and the revision obviously were intended to reflect the intent of Representative Harrington and those supporting his proposal. As seen there were ample grounds which had been stressed by the Commission, for distinguishing between the measure of protection to be afforded railroad and motor carrier employees.

After the bill was recommitted to the Conference Committee, the differences between the House and the Senate were resolved and S. 2009 was amended and enacted into

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[5] The revision reads as follows: "As a prerequisite to its approval of any consolidation * * * ", in respect to carriers by railroad subject to the provisions of Part I, and as a prerequisite to its approval of the substitution and use of another means of transportation for rail transportation proposed to be abandoned, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order, * * *, granting approval * * *, the Commission shall include terms and conditions providing that such transaction will not result in employees of said carrier or carriers being in a worse position with respect to their employment. * * * '

law as the Transportation Act of 1940, including the present language of Section 5(2)(c) and (f).

The intention of Congress with respect to the Harrington Amendment is summed up in the debates on the second conference report. Representative Halleck stated: (86 Cong. Rec. 10187)

> "As to the Harrington amendment, I do not know what the author of that amendment is going to do about this bill, but I do know and understand that the people whose cause he so valiantly championed are not objecting to this provision as it is now written. It follows the principle of the so-called Washington agreement that was a contract entered into by the carriers with their employees to fix the rights of employees whose employment terminated upon consolidation. This language gives to the employees greater protection and more far-reaching protection and recognizes the principle to which we all subscribe, that rights of employees should be protected, and beyond that, writes it into law."

Representative Wolverton spoke even more strongly: (86 Cong. Record 10189)

> "* * * Nor should anyone overlook the fact that the adoption of this amendment is agreed to by the conferees gives *railroad* workers protection against sudden dismissal and financial assistance *that is not enjoyed by workers in any other industry.* And, this is true without any exception of qualification whatsoever." (Emphasis added)

From its inception, the Harrington amendment was designed *solely for the protection of railroad employees.* The testimony in support of the employee protective provisions is exclusively limited to protection for railroad workers and *nowhere in the Congressional reports or debates on the bill can there be found one single reference to the need for protection of motor carrier employees.* To the contrary, in the two instances in which motor carrier employees were

mentioned *it was pointed out that such provisions should be made discretionary,* rather than mandatory. Congress was aware that the amendment as agreed to by the conferees granted to *railroad* workers only, a degree of protection against sudden dismissal "that is not enjoyed by workers in any other industry." Both their legislative history as set forth above and the very fact that two radically differing subparagraphs were both made a part of Section 5(2) make it clear beyond any doubt that Congress intended to grant a mandatory employment protection exclusively to rail workers while providing only that the interests of motor carrier employees should be considered and given weight.[6] Clearly, there is no merit whatever to the argument that employees of motor carriers are entitled as a matter of law to the same measure of protection as railroad employees.

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[6] It may be observed, parenthetically, that this unequal treatment, the granting to railroad employees of a gratuity not granted to motor carrier employees, in no way affected the validity of the legislation. *Detroit Bank* v. *U. S.*, 317 U.S. 329, 337; *Currin* v. *Wallace,* 306 U.S. 1, 13-14; *U. S.* v. *Petrillo,* 332 U.S. 1, 8-9.

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, intervenor-appellee American Buslines, Inc., moves that the judgment of the United States District Court for the District of Columbia (entered on May 4, 1966), be affirmed.

DISTRICT COURT PROCEEDING BELOW

Involved at present is a direct appeal from the final judgment of a specially-constituted three-judge district court. The opinion of that court below is found at 253 F. Supp. 481.

COMMISSION DECISIONS BELOW

The pertinent opinions of the Interstate Commerce Commission are found at 80 M.C.C. 681, 90 M.C.C. 173 and 97 M.C.C. 426.

PERTINENT STATUTORY PROVISIONS

Section 5(2) of the Interstate Commerce Act is involved (49 U.S.C.A. Section 5[2]), and particularly sub-sections (b), (c) and (f) thereof.

BACKGROUND OF THE CASE

American Buslines, Inc. (hereinafter referred to as American Buslines), is a corporation organized and existing under the laws of the state of Delaware, with its principal office at Lincoln, Neb. American Buslines holds authority from the Interstate Commerce Commission to operate as a motor common carrier of passengers and express over routes extending from coast-to-coast, between New York, N.Y., and Los Angeles and San Francisco, Calif.

Amalgamated Association of Street, Electric Railway and Motor Coach Employese of America, AFL-CIO (hereinafter referred to as Amalgamated), is a labor organization acting as collective bargaining representative for certain American Busline employees.

On November 18, 1958, Midwest Buslines, Inc. of Little Rock, Ark. (hereinafter referred to as Midwest)

and American Buslines filed applications before the Interstate Commerce Commission, under Section 5 of the Interstate Commerce Act, in which American Buslines sought approval for sale of its routes between Kansas City, Mo. and Memphis, Tenn. to Midwest. Additionally, by applications filed on November 19, 1958, Commission approval was sought for purchase by Continental Tennessee Lines, Inc. of Alexandria, La. (hereinafter referred to as Continental), of another portion of the routes of American Buslines between Memphis, Tenn. and Chattanooga, Tenn.

Both applications before the Commission (*Midwest Buslines, Inc.—Purchase* [*Portion*]*—American Buslines, Inc.,* Docket No. MC-F-7041; and, *Continental Tennessee Lines, Inc.—Purchase* [*Portion*]*—American Buslines, Inc.,* Docket No. MC-F-7042) were set for hearing on a consolidated record. The initial hearing before a hearing examiner of the Commission was held on February 17, 1959. At the consolidated hearing Amalgamated appeared as the only protestant, and confined its participation to cross-examination of applicants' witnesses.

The examiner in his report recommended approval of the transactions subject to a condition designed to reserve Commission jurisdiction for three years from the date of consummation with respect to such carrier employees as might be adversely affected by the transaction. After the examiner's report and recommended order was served, exceptions were filed by Amalgamated and applicants replied. Thereupon, Division 4 of the Commission, on November 12, 1959, issued its report determining that there was insufficient evidence of record to warrant imposing specific conditions dealing with particular employees, or groups of employees;

but also finding that since as a result of consummation the effect upon employees would become more apparent within a reasonable time, it would reserve jurisdiction for a period of three years to make additional findings and impose such terms and conditions with respect to employees as would be necessary and lawful. The parties consummated the transactions on December 31, 1959.

On April 11, 1960, Amalgamated petitioned the Commission requesting reopening and imposition of a formula of conditions for employee protection, including reimbursement of wages (and moving expenses) allegedly lost as a result of the transactions. To this petition the three carriers replied. Then, by order dated September 20, 1960, Division 4 granted the petition of Amalgamated to the extent of reopening the proceedings for further hearing solely for the purpose of affording the parties an opportunity to present evidence showing specifically how, and to what extent, particular employees of the carriers had been adversely affected by the transactions. The reopened proceeding was held before an examiner of the Commission on January 4-5, 1961. At that hearing the Brotherhood of Railroad Trainmen, representing employees of Midwest, intervened opposing Amalgamated's position. At that hearing a union official and two employees testified on behalf of Amalgamated. American Buslines presented exhibits showing what wages the employees would have been paid upon termination of the strike if they had chosen to accept the work made available to them by American Buslines.

On May 3, 1961, the examiner issued his report and order recommending denial of Amalgamated's petition. Following exceptions and replies, Division 3 of

the Commission issued its report and order denying Amalgamated's petition. In that report Division 3 found that any grant of the damages claimed, whether through imposition of specific conditions, or by application of a particular formula, would be contrary to the understanding of the parties in reaching a settlement of the strike. Further, the Division believed that imposition of conditions or application of a formula as suggested by Amalgamated would not be an equitable adjustment in that it would overburden American Buslines at this time. A further petition was filed by Amalgamated requesting that the entire Commission determine that the proceeding involved an issue of general transportation importance. This petition was denied by order of the entire Commission on July 23, 1962.

Amalgamated then, on January 7, 1963, filed a complaint in the United States District Court for the District of Columbia, in Civil Action No. 53-'63, seeking to set aside the report and order of the Commission. In that proceeding before the District Court the parties other than the government were the plaintiff, Amalgamated (the collective bargaining representative for American Buslines employees); American Buslines (the vendor in the proceeding before the Commission which had contracted to sell two of its bus routes); Midwest (which purchased one of these routes); and, Continental Tennessee Lines (the carrier which purchased the second route). Before the Court, Amalgamated did not protest the Commission's approval of the sale transaction itself, but complained that the Commission's refusal in its report and order after the reopened hearing, to impose conditions requiring financial protection for the carrier employees affected

by the sale was contrary to the requirements of the Interstate Commerce Act.

American Buslines, Midwest and Continental Tennessee Lines were permitted to intervene before the Court on April 3, 1963. Following oral argument, in which American Buslines participated, the Court (Washington, Circuit Judge; McGuire and Curran, District Judges), on August 2, 1963, issued its decision and entered judgment for Amalgamated, remanding the case to the Commission for further proceedings not inconsistent with the Court's opinion. The Court stated that the grounds on which the Commission relied in denying relief to Amalgamated were erroneous, and the Commission order would therefore be set aside. The Court, however, also said that it would not attempt to delineate the measure of relief, if any, to be provided the employees of American Buslines, since this matter was reserved, subject to judicial review, to the Commission for determination in the first instance. Finally, the Court said: ". . . we think that if any particular measure of relief is one which would ordinarily be granted to railroad workers similarly situated, the Commission should not deny it to the employees of America Buslines, Inc., without a reasoned explanation of its denial. . . ."

Upon remand and reconsideration, in its report issued on August 26, 1964, the Commission by a 6-to-5 vote of its 11 members modified its findings in prior reports (80 M.C.C. 681 and 90 M.C.C. 173), and directed the imposition of conditions to the purchase transactions. Basically, these conditions provided that any of the driver-employees of American Buslines who were forced to incur expenses in moving their households because of reassignment resulting from the

transactions authorized by the Commission, were to be paid a lump sum settlement by American Buslines equal approximately to the amount of those costs incurred, and that in the event of any dispute arising with respect to this protection, which dispute could not be settled by the carrier and employee within 30 days after it arose, the matter might then be referred by either party to an arbitration committee for consideration and determination. American Buslines petitioned for reconsideration, but by order of January 27, 1965, the Commission denied this petition for reconsideration without opinion.

Thereupon, American Busline filed a complaint before the United States District Court for the District of Columbia, Civil Action No. 644-'65. Also, in Civil Action No. 684-'65 Amalgamated sought to set aside and vacate the order of the Commission, since that order denied, in part the petition by Amalgamated seeking imposition of protective provisions. As a party in interest American Buslines sought permission to intervene in opposition to the relief sought by Amalgamated in Civil Action No. 684-'65; and petitioned for consolidation of Civil Action No. 684-'65 with Civil Action No. 644-'65. This intervention and consolidation was ordered by the Court on October 19, 1965. At that time a motion was also made by the Teamsters and the Interstate Commerce Commission to consolidate with the Amalgamated case and the American Buslines case a third case of the *Teamsters* v. *Interstate Commerce Commission,* Civil Action No. 894-'65. This consolidation was permitted. The action by the Teamsters involved a different purchase case under Section 5 of the Act, where Overnite Transportation Company and Rutherford Freight Lines, Inc., sought

authority for purchase by the former of the operating rights and the property of the latter. The Teamsters complained that the Commission failed to impose the protective conditions which it requested.

In essence then, Amalgamated sought to have certain protective provisions enforced; American Buslines sought to preclude establishment of any protective provisions, and the Teamsters sought to have protective provisions applied, but with regard to a different purchase transaction than that involved in the Amalgamated and American Buslines cases.

NATURE OF THE DISTRICT COURT DECISION

At 253 F. Supp. 481 (in the consolidated proceeding Civ. A. Nos. 644-'65, 684-'65 and 894-'65) the District Court viewed the issues as:

> 1. Whether the Commission policy to protect motor carrier and railroad employees differently had a rational basis and warrant in the Interstate Commerce Act.
>
> 2. Whether the protection granted the motor carrier employees in the two purchase transactions was fair and equitable.
>
> 3. Whether the Commission had statutory authority to require compulsory arbitration of disputes over the protection it affords employees as a condition to its approving a transaction under Section 5 of the Act.

The District Court found that the policy of the Commission to protect employees affected by financial transactions between motor carriers differently from employees where railroads were involved was sup-

ported by a rational basis and was authorized by the statute. The District Court also concluded that the protection given to motor carrier employees of the two proceedings before it had been fair and equitable to both employees and the involved motor carriers. Finally, the District Court held that the Commission may lawfully require compulsory arbitration of disputes over the protection granted employees as a condition to its approving a transaction under Section 5.

Therefore, the District Court dismissed the three consolidated actions, and sustained the decisions of the Commission. From this decision and judgment of the District Court, Amalgamated has taken this appeal.

ARGUMENT IN SUPPORT OF MOTION TO AFFIRM

Appellant's argument in its jurisdictional statement turns simply on the contention that different Commission protection of rail as opposed to motor carrier employees must by its very nature be unfair and inequitable. Such reasoning is self-limiting.

Involved are two entirely different types of employees, working in two vastly different industries. As noted by the District Court at page 483, displaced rail employees have been traditionally recognized as facing greater difficulties in obtaining similar new positions, than displaced motor carrier employees. Thus it is that while in the case of rail employees the statute makes it mandatory that certain protective requirements be established, on the other hand where motor carrier employees are the subject of consideration the statute leaves the matter to the Commission's discretion, and so leaves to the Commission sufficient flexibility with which to meet new problems in the com-

paratively new and more recently expanding motor carrier industry.

Furthermore, it is entirely appropriate that such flexibility remain to the Commission—an agency specifically constituted to render expert judgment in the fields of commerce and transportation. Who it may be asked is closer to the situation, and more familar with the daily problems of these two industries than the Commission? Who has more experience in problems such as these than the Commission?

Clearly, because of the nature of the motor carrier industry, the degree of transferability of motor carrier employees is considerably more than that of rail employees; and just as clearly the skills of motor carrier employees are not as technical and restricted as those of rail employees.

Further, while appellant accuses the Commission of categorically refusing to apply rail provisions in motor carrier cases, this is not what the Commission has said or done. The Commission has correctly pointed out that there is no mandatory Congressional requirement that rail provisions be equally applied in motor carier cases, and since the provisions applied in motor carrier cases have been left to Commission discretion, it will not apply rail provisions in motor carrier cases unless *compelling reasons so dictate.* This is because in the absence of such compelling reasons the Commission in its experience does not feel rail provisions are necessary in motor carrier cases, and because other different types of provisions are applied in motor carrier cases which more than amply protect those employees.

Certainly, the Commission is not arbitrary in taking this stand. In fact in some other cases the Commission

has actually suggested to the parties in motor carrier cases that voluntary consideration be given to certain of the rail provisions. The Commission has merely been given the freedom by Congress to adapt itself to the increasingly complex problems which arise in the motor carrier industry. The Commission is thus free to fit the remedy to the specific problem. Rail provisions are, after all, but one of many different types of provisions from which the Commission might choose. On what basis can appellant *demand* that in every instance rail provisions must be applied?

The Commission defends its flexibility, and rightly so. Rail provisions would be applied here if compelling reasons so dictated. The Commission has thoroughly investigated into this matter (and has re-investigated on remand), and the end result has been that no such compelling reasons have been found. The Commission, thus, applied other provisions which in its expert opinion were more fitted to the circumstances. The District Court recognized the obvious logic in this, and recognized that basically the problem was one to be balanced by the Commission. The District Court said at page 484:

> "The Commission was not required to follow the mandate of the Congress regarding the minimum protection granted railroad employees as a guide to the minimum protection for motor carrier employees. We cannot say that, under the circumstances of these cases, the motor carriers' employees involved are so similarly situated to railroad employees as to entitle them to more protection than the Commission has awarded them."
>
> * * *
>
> "Congress has prescribed no minimum statutory criteria for motor carrier employees, for the

> only standard is whether the particular protection of each case is fair and equitable in the circumstances. The majority of the Commission has granted only such protection as the employees would have been entitled to had they followed their work, and such protection seems fair and equitable to employees of American Buslines."

Simply as an example, note in the latter portion of the above quotation the reference to whether or not the displaced employees accepted work with the purchasers of their former employer. In essence, the Commission recognized that American Buslines should not be required to compensate employees for losses when the choice had been made voluntarily by the employee and the loss was not the direct result of the transaction. As Division 3 of the Commission well said in the closing paragraphs of its decision served herein on March 30, 1962:

> ". . . Section 5(2)(c) does not require that such employees be held harmless whatever the circumstances. A balance must be struck between the interests of the carrier, the employees, and the public and to insure only that the employees receive fair and equitable treatment."

Again, the balancing process—and this was just one of the many matters balanced by the Commission in determining what provisions should appropriately be applied, considering the circumstances.

Appellant speaks in terms of due process as if due process of itself required categorically the same treatment of different employees, in different industries, surrounded by different circumstances, in situations governed by different Congressional mandates. It would seem almost more reasonable to urge that due

process would be *violated* by similar treatment of individuals so differently situated.[1]

In fact, contrary to appellant's view, due process has not been violated; the subtsantial evidence rule has not been violated; nor any of the other rules with which appellant would arm itself. Administrative agency discretion was fairly exercised; the administrative balancing process was utilized to its fullest; when this proceeding before the Commission was complete a thorough-going investigation into the entire case had been accomplished; the Commission ruled fairly upon consideration of the interests of all parties—and the District Court accepted and affirmed the Commission's action as a fair and equitable treatment of the employees and the others involved.[2]

However, it is to be noted that by moving to affirm the decision of the District Court American Buslines

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[1] Lack of uniformity in statutory rights is not *per se* a denial of equal protection of the laws, especially when the lack of uniformity is reasonably related to the purposes of the statute in which it is found. See: *Smith* v. *Cahoon,* 283 U.S. 553 (1931) and *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412 (1920). See also: *Currin* v. *Wallace,* 306 U.S. 1, 13-14 (1939), where it was said—"There is no requirement of uniformity in connection with the commerce power. . . ."

[2] So long as substantial evidence supports Commission findings on the record viewed as a whole, it remains the exclusive province of the Commission to draw legitimate inferences of fact and to make findings and conclusions of fact and to determine the weight of the evidence. Judicial review of administrative orders is usually thought of as limited to discovery of misconceptions of law, and correction of those misconceptions. See: *Scripps Howard Radio* v. *F.C.C.,* 316 U.S. 4, 10 and *I.C.C.* v. *Union Pacific R.R. Co.,* 222 U.S. 541, 547 (1912). The judicial function is thus exhausted when a rational basis for administrative conclusions has been found. See: *Mississippi Valley Barge Line Co.* v. *U.S.,* 292 U.S. 282, 286-287 (1934).

does not concede (nor argue at this time) the right of the Commission to compel arbitration of matters which may or may not be covered by a collective bargaining agreement; since this is an issue which can only be reached in a different context of circumstances, after the parties have attempted to comply in good faith with the decision of the Commission.

In short, there is no substantial question presented by this appeal, and it is respectfully submitted that the judgment of the District Court is so clearly correct that it may properly be affirmed by this Court without further briefs and oral arguments.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 496

AMALGAMATED TRANSIT UNION, AFL-CIO, *Appellant*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees*

and

AMERICAN BUSLINES, INC. and NATIONAL ASSOCIATION OF MOTOR BUS OWNERS, *Intervenor-Appellees*

On Appeal from the United States District Court for the District of Columbia

MOTION TO AFFIRM AND BRIEF IN SUPPORT BY NATIONAL ASSOCIATION OF MOTOR BUS OWNERS

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On Appeal from the United States District Court for the District of Columbia

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MOTION TO AFFIRM AND BRIEF IN SUPPORT

Appellee in the above-entitled case moves to affirm the judgment below on the grounds that the questions presented are so unsubstantial as not to need further argument.

QUESTIONS PRESENTED

The issue is whether any substantial questions are raised as to the following:

(a) Whether the labor conditions made mandatory under Section 5(2)(f) of the Interstate Commerce Act (Act), 49 U.S.C. § 5(2)(f), for rail carrier employees affected by transactions subject to Section 5 of the Act must be accorded to motor carrier employees affected by similar transactions under Section 5(2)(c) of the Act, 49 U.S.C. § 5(2)(c), giving the Commission discretionary authority to impose labor conditions for motor carrier employees:

(b) Whether the Commission abused its discretion in this proceeding; and

(c) Whether different treatment of rail and motor carrier employees is unlawfully discriminatory under the Fifth Amendment to the Constitution of the United States.

COUNTER STATEMENT OF FACTS

This is an appeal from a statutory three-judge District Court of the United States District Court for the District of Columbia, reported at 253 F. Supp. 481.[1] The appeal involves an award of labor protective conditions by the Interstate Commerce Commission under Section 5(2)(c) of the Act in an administrative proceeding for approval of transfers of operating rights between motor carriers of passengers.

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[1] The text of the decision is set forth in the appendix to Appellant's Jurisdictional Statement (hereafter Jur. St.) beginning at page 1a.

Three reviews of this case were completed by the Commission.[2] There have also been two reviews, initiated by appellants, by three-judge District Courts (221 F. Supp. 958 and 253 F. Supp. 481). Thus, this will be the sixth time the appellant has, with dogged determination, pursued its contention that the discretion accorded the Commission under Section 5(2)(c) of the Act may only be exercised by the imposition of the same labor protective conditions for motor carrier employees as the Commission is required to accord rail carrier employees under Section 5(2)(f) of the Act.

From 1953 through the first eight months of 1958, American Buslines sustained operating losses aggregating $2,222,797 (Jur. St., App. 29a). During this period of time the carrier was undergoing reorganization and it was operated by a trustee from February 10, 1954 through September 22, 1958 (*Ibid.*). Its monthly cash requirements were approximately $800,000 and its only source of funds was from borrowing or the sale of portions of its properties (*Id.* at 29a-30a).

In addition to its poor financial condition, American suffered by its employees represented by appellant (Amalgamated Transit Union) going on strike on July 1, 1958. The strike continued into 1959.

In the meantime, American was continuing with efforts to dispose of properties. These efforts culminated in an application filed with the Commission on November 18, 1958 for approval of a transfer of operating rights between Kansas City, Missouri and Mem-

[2] The decisions of the Commission are reported at 80 M.C.C. 681 (1959); 90 M.C.C. 173 (1962), and 97 M.C.C. 426 (1964).

phis, Tennessee to Midwest Buslines. On the following day a similar application was filed for transfer of operating rights between Memphis and Chattanooga, Tennessee to Continental Tennessee Lines.

On December 5 and 6, 1958, the Commission approved lease of these operating rights to the acquiring companies pending consideration of the applications for approval of the transfers under Section 5 of the Act. Hearings on the applications commenced on February 17, 1959. The appellant was an intervenor in the application proceedings.

A strike settlement was reached on July 18, 1959 and supplemented on July 31, 1959. The settlement contained a provision releasing all claims the parties had against one another. (See 90 M.C.C. 173; Jur. St., App. 10a).

The strike officially terminated on August 1, 1959. While the strike was in progress the American employees "scattered all over the country" (Jur. St., App. 32a). Accordingly, it was agreed between the parties after the strike that, while American was returning operations to normal, seniority in work assignments would not be observed and drivers could accept jobs in the system wherever they were open. Reemployment of all drivers was offered. Since there was a shortage of drivers in the Eastern District, based at Pittsburgh, jobs were open there and, in all, twenty-two of 41 drivers accepted employment in that District. These jobs paid more than ones in the Central or Southern Districts, where the reemployed drivers had formerly worked, but seniority was not carried from one district to another. Thus, in order to preserve seniority in the Central and Southern Districts, drivers

going to the Eastern District were given the opportunity to take furloughs from their former district of work and to return there with their seniority when jobs became available (Jur. St., App. 18a-19a).

On November 12, 1959, the Commission (Div. 4) approved the route sales and reserved jurisdiction for three years for the purpose of fashioning such employee conditions as could become necessary and lawful (80 M.C.C. 681). Thereafter, on December 31, 1960, the sales were consummated.

On April 11, 1960, appellant sought reconsideration for the imposition of conditions granting wage allowances and moving expenses to the employees. After hearings, Division 3 of the Commission determined, *inter alia,* that it could not be found that any losses of the employees were attributable to the route sales, rater than the strike, and the requested conditions were denied. (80 M.C.C. 173).

Appellant then sought judicial review and the first three-judge District Court reversed and remanded (221 F. Supp. 958). The Court stated that it "need not attempt to delineate what measure of relief, if any, should be provided to the employees of American . . ." The Court added that the Commission should give a "reasoned explanation" for not according employees the same conditions required for rail carrier employees under Section 5(2)(f) of the Act.

On remand the Commission again considered the argument that the mandatory labor conditions of Section 5(2)(f) for rail carriers must be adopted under the discretionary provisions of Section 5(2)(c) of the Act which is applicable to motor carrier employees. The National Association of Motor Bus Owners

(NAMBO), movant here, intervened in the proceeding before the Commission and argued that Section 5(2)(c) leaves to the discretion of the Commission the kind of conditions, if any, which must be prescribed for motor carrier employees. It added that the mandatory rail carrier provisions of Section 5(2)(f) are not applicable.

In its report the Commission reviewed the legislative history of Sections 5(2)(c) and 5(2)(f), concluding that Congress intended different treatment for bus and rail employees (Jur. St., App. 23a-27a). It found that alleged losses of wages from "bumping" and other causes are "impossible to ascertain, minor in extent, and difficult to attribute to this transaction rather than to the strike or other personnel adjustments." (Jur. St., App. 30a-fn. 6). It further found, however, that moving expenses, wage losses sustained by the employees while moving and related expenses could be attributed to the route sales and that the employees should be reimbursed to this extent (Jur. St., App. 31a). Accordingly it ordered lump sum payments to the employees approximating such costs.

Again the appellant sought judicial review and the second three-judge Court decision was issued (253 F. Supp. 481). The Court reviews the legislative history of the Act, concluding, as did the Commission, that the mandatory provisions of Section 5(2)(f) of the Act are not applicable under Section 5(2)(c) which gives the Commission discretion to fashion labor conditions for motor carrier employees. Reviewing the record before the Commission it found that discretion had not been abused.

The appellant thereafter filed this appeal.

ARGUMENT

NO SUBSTANTIAL ISSUES HAVE BEEN RAISED BY APPELLANT

A. The Mandatory Rail Carrier Provisions of Section 5(2)(f) of the Act Do Not Control Commission Discretion Under Section 5(2)(c) of the Act

Section 5(2)(c) of the Act requires the Commission to "give weight" to specified factors, including carrier employees affected, as follows:

> ". . . The Commission shall *give weight* to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." (Emphasis added.)

The language of the provision is directed to all carriers subject to the Act, including motor carriers regulated by the Commission. This is followed by the provisions of Section 5(2)(f), which are expressly directed exclusively to rail carriers and are couched in mandatory rather than the "give weight" discretionary terms of Section 5(2)(c), as follows:

> "*As a condiiton of its approval,* under this paragraph, of any transaction involving a *carrier or carriers by railroad* subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the *railroad employees* affected. In its order of approval the Commission *shall* include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in em-

ployees of the *carrier or carriers by railroad* affected by such order being in a worse position with respect to their employment . . . ." (Emphasis added).

Under the plain language of Section 5(2)(f) it applies only to rail carriers. Similarly, under the plain language of Section 5(2)(c) the Commission is accorded discretion as to conditions for employees (other than railroad) and their interests are only one of several other factors to be considered.

In its decision herein the Commission has given detailed reasons why Congress chose to differentiate motor carrier employees from rail carrier employees (Jur. St., App. 23a-27a). It refers to the fact that in 1936, before Section 5 was adopted in 1940, two hundred nineteen railroads entered into the so-called Washington agreement with twenty-one labor organizations which set out specific minimum protective conditions for employees affected by rail mergers (Jur. St., App. 14a, 25a). See *United States* v. *Lowden,* 308 U.S. 225, 234 (1939). These provisions were largely repeated in Section 5(2)(f) of the Act. In addition, "a large portion of rail operating employees possess long training and skills that can ordinarily be used only in the railroad industry and are not readily adaptable to other types of jobs, while exactly the reverse is true in the motor carrier industry, where drivers constituting 50 percent of the total employment, have skills which are readily transferable to the operation of any type of motor vehicle, and that, likewise, the mechanics, dispatchers, clerks, and other employees are also readily adaptable to similar jobs in other industries." (Jur. St., App. 13a, 28a). The Commission

further noted the greater financial ability of rail carriers to absorb labor condition costs (*Id.* at 28a). Finally, the Commission reviewed the legislative history of these provisions noting, among others, the letter of ICC Chairman Eastman to the Interstate Commerce Committees of the House and Senate, at the time the legislation was pending, in which he urged legislation for rail employees based on the so-called Washington Agreement and legislation for motor carrier employees "to make the authority discretionary rather than mandatory." (Jur. St. App. 25a).

Thus, the plain language of Congress in these provisions is based upon the realities of conditions in the rail carrier industry as they differ from conditions in the motor carrier industry. Aside from this, the intent of Congress is clear and the Commission correctly concluded that the mandatory provisions of Section 5(2)(f) of the Act do not control its discretion as to motor carrier employees under Section 5(2)(c) of the Act.

B. The Commission Did Not Abuse Its Discretion

The Commission, after considering the statute and its legislative history, outlined the nature of its discretionary exercise of authority in Section 5 proceedings involving motor carriers, as follows:

> ". . . Section 5 does require us to consider all aspects of the transaction as they affect the public interest. This includes the effect on employees. And in determining whether employees should receive any protection or compensation for the adverse effect which a transaction has upon them, we must consider the size and financial resources

> of the carriers involved, the expanding nature of the motor carrier industry, and the high degree of transferability of motor carrier employees within the industry. . . ." (Jur. St., App. 28a).

These are matters in which the Commission is a recognized expert. It applied its expertise to considerations of the financial weakness of American over the years; the effect of the strike on the claims of the Appellant, *i.e.,* whether injuries alleged resulted from the strike or the route sales under review; the skills of employees involved; and the efforts made by American to find reemployment for the employees. On this basis it concluded that the employees were entitled to payments for some losses (moving expenses, loss of pay while moving, temporary maintenance of two households, and increased rents and utility costs) but not for others. This painstaking review of the evidence, conditions in the industry and applicable law is the very antithesis of abuse of discretion.

C. There Is No Violation of Fifth Amendment Guarantees

There is no merit whatsoever in the contention of appellant that different standards of treatment for rail and motor carrier employees would violate the Fifth Amendment to the U. S. Constitution. The contention is based on the erroneous assumption that the difference in treatment is discriminatory. The fact is that the difference is required by the differing conditions in the rail and motor carrier industries.

This Court has held that the "Fifth Amendment, unlike the Fourteenth, has no equal protection clause." *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 584-585 (1937); *Sunshine Anthracite Coal Co.* v. *Adkins,* 310

U.S. 381, 401 (1940). Albeit, discrimination may be " 'so unjustifiable as to be violative of due process.' " *Schneider* v. *Rusk,* 377 U.S. 161, 168 (1963). However, as made clear in the opinion below, the plain language of the statute, the legislative history and the facts of the instant case, the variance of treatment of employees of motor carriers vis-a-vis railroad employees is completely in accord with the distinctions inherent in the two industries.[3] Accordingly, appellant's due process contention is unsubstantial.

CONCLUSION

The appellant, after five other opportunities in this case, is trying to bring about judicial amendment of Section 5(2)(c) of the Act. That section leaves to the discretion of the Commission what kind, if any, labor conditions are to be imposed in transactions subject to Section 5 of the Act. There is no requirement that the mandatory provisions of Section 5(2)(f) for rail carrier employees are to be applied to motor carrier employees. The discretion of an administrative agency is involved and it has been painstakingly applied without abuse.

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[3] Compare *Dominion Hotel* v. *Arizona,* 249 U.S. 265, 268 (1919), where the State of Arizona had exempted railroad restaurants from an hours-of-labor law applicable to hotels. Upholding the classification, this Court, per Holmes, J., said:

> "The Fourteenth Amendment is not a pedagogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same names must be treated in the same way. . . . The only question is whether we can say on our judicial knowledge that the legislature of Arizona could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law. . . ."

The questions thus raised by appellant are not substantial. The judgment below should be affirmed.

Respectfully submitted,

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OCTOBER TERM, 1966

No. 496

AMALGAMATED TRANSIT UNION, AFL–CIO, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

No. 497

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA AND LOCAL UNION 549, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

282-914—66

STATEMENT

These cases are direct appeals from a judgment of a three-judge district court (IBT J.S. 39)[1] dismissing separate suits brought to set aside two orders of the Interstate Commerce Commission (ATU J.S. App. B, 8a–32a; IBT J.S. App. C, 41–58). Both appeals raise the same question: whether the Commission is required as a matter of law to include in any order approving a motor-carrier unification the same protective conditions for the motor carriers' employees as are required for railroad employees by Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. 5(2)(f).

No. 496. The Commission granted permission to Midwest Buslines, Inc., and Continental Tennessee Lines, Inc., to purchase two of American Buslines' routes (ATU J.S. 9a). Twenty-two of the forty American drivers on those routes remained in the employ of American, and it is on their behalf that petitioner Transit Union asserts that the protective conditions imposed by the Commission are inadequate (ATU J.S. 18a).[2] The Commission found that none of the American drivers had suffered a loss of wages as a result of the unification (ATU J.S. 27a). Each

[1] "IBT J.S." refers to the jurisdictional statement filed by the International Brotherhood of Teamsters, *et al.*, in No. 497. "ATU J.S." refers to the jurisdictional statement filed by the Amalgamated Transit Union in No. 496.

[2] The challenged conditions were imposed in proceedings on remand from an earlier decision by the district court setting aside an order in which the Commission had declined to establish any protective conditions. *Amalgamated Ass'n of Street, Elec. Ry.* v. *United States*, 221 F. Supp. 958 (D.C.D.C.).

had sufficient seniority to obtain higher-paying jobs on other routes with American (ATU J.S. 18a), albeit a change of residence was required (ATU J.S. 18a, 27a). In these circumstances, the Commission declined to provide protection against loss of wages (ATU J.S. 27a). The Commission did, however, provide for lump-sum payments to the drivers approximately equal to costs incurred in moving households, loss of pay while moving, temporary maintenance of two households, and increased rents and utility costs for a period of one year from the date of their re-assignment (ATU J.S. 31a).

The Commission noted that although Section 5(2)(f) requires mandatory financial protection of railroad workers for a minimum of four years, no such formula of protection has been prescribed by Congress or applied by the Commission in the case of motor-carrier employees (ATU J.S. 23a–28a). The Commission held, therefore, that it was not required to grant equally extensive protective conditions to motor-carrier employees unless in a particular case there were compelling reasons for imposition of such conditions and that none was shown here (ATU J.S. 28a).

No. 497. The Commission granted the application of the Overnite Transportation Company to purchase all of the operating rights and properties of Rutherford Freight Lines, Inc., on the condition that any employee separated from his employment with either carrier as a result of the transaction be given up to three months' severance pay (IBT J.S. 57–58). The Commission determined that such payments would be

sufficient to tide over separated employees until they gained new employment (IBT J.S. 56) and would not imperil the financial ability of Overnite to purchase the financially stricken Rutherford company (IBT J.S. 56). The Commission contrasted the employment opportunities available to the displaced motor-carrier employee with the plight of the similarly situated railroad employee. It noted that motor-carrier employees possess more flexible skills than most railroad employees, which allows them more readily to be absorbed in other industries, and that the employment opportunities of motor-carrier employees are also superior in that the truck, bus and auto industries, unlike the railroad industry, are expanding (IBT J.S. 55).

On appeal, the cases were consolidated.[3] The district court found that the protective conditions provided by the Commission were fair and equitable to both the employees and the motor carriers involved (ATU J.S. 5a–7a). It also sustained the Commission's policy of protecting motor carrier employees, as a class, differently from rail employees (ATU J.S. 5a–6a). The court found this policy to have a rational basis and held that the statutory protections for railroad employees contained in Section 5(2)(f) do not govern motor-carrier consolidations (ATU J.S. 6a).

ARGUMENT

These appeals do not warrant plenary consideration. The judgment below is correct and should be affirmed.

[3] A third suit was brought by American Buslines, Inc., to contest the Commission's order in No. 496 and was consolidated with the other two below. No appeal has been taken by American Buslines, however.

1. Congress has not required the Commission to grant motor-carrier employees the same protection as railroad employees. Section 5(2)(f), which sets forth certain mandatory provisions, is by its terms applicable only to railroad employees. The relevant legislative history (H. Rep. No. 2832, 76th Cong., 3d Sess.; 86 Cong. Rec. 5869–5871, 5878, 5879–5881, 5883–5884, 11537, 11545) shows the same limited concern. We alluded (Statement, *supra,* p. 4) to the policy considerations which support different legislative treatment of the two classes of employees. We note also that when Section 5(2)(f) was added to the Act in 1940, the great majority of the nation's railroads and railroad labor organizations had recently entered into an industry-wide bargaining agreement (the Washington Agreement of 1936, see IBT J.S. 15) establishing a norm for protective conditions in railroad consolidations and thus a basis for detailed legislative treatment. No such norm has ever been established for the motor-carrier industry.[4]

2. Section 5(2)(c) of the Interstate Commerce Act, 49 U.S.C. 5(2)(c), which provides that in passing upon any proposed unification—motor or rail—the Commission shall give weight to the "interest of the carrier employees affected," does not automatically extend the requirements of Section 5(2)(f) to motor-

[4] *United States* v. *Lowden*, 308 U.S. 225, 234, which held prior to the enactment of Section 5(2)(f) that the Commission had properly imposed protective conditions in a railroad consolidation substantially similar to those approved in the Washington Agreement, thus lends no support to appellants' position.

carrier employees. It simply requires that in both rail and motor unifications the Commission take into account the impact on the employees involved. Unlike Section 5(2)(f), which lays down specific conditions for railroad employees, Section 5(2)(c) is general in terms. The amount and kind of protection to be accorded motor-carrier employees under Section 5(2)(c) consequently depends on how the interests of those employees are affected by particular unifications. *Short Line, Inc.—Purchase—New England Transp. Co.*, 75 M.C.C. 33, 37; *Baggett Transp. Co.—Purchase—Hunt, Freight Lines, Inc.*, 75 M.C.C. 147, 152, appeal dismissed *sub nom. Baggett Transportation Company* v. *United States*, 206 F. Supp. 835, 841 (N.D. Ala.).

Determination of what is fair and equitable is a matter for the expert administrative discretion of the Commission. Appellants have made no showing that the employee protective conditions imposed for their benefit were not adequate to compensate them for the economic disadvantages that may reasonably be anticipated to result from approved transactions. Nor have they shown that the circumstances are such as to compel the imposition of the identical protective conditions required to be granted railroad employees. Cf. *Day* v. *United States*, 246 F. Supp. 689 (S.D. Cal.), affirmed *per curiam*, 384 U.S. 267; *Brotherhood of Locomotive Engineers* v. *United States*, 217 F. Supp. 98, 103–104 (N.D. Ohio).

3. The distinction drawn by Congress and the Commission between the two classes of employees is not an unconstitutional discrimination, for the classification is clearly reasonable. See *United States* v. *Petrillo,* 332 U.S. 1, 8–9; *Currin* v. *Wallace,* 306 U.S. 1, 13–14; *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 584–585. Congress has singled out railroad employees for unique treatment in many areas, including collective bargaining and grievances,[5] retirement benefits,[6] and unemployment compensation.[7] Moreover, as the Commission noted the employment situations in the rail and motor-carrier industry are entirely different (Statement, *supra,* p. 4). Displaced rail employees face an industry in which employment is shrinking while the displaced motor-carrier employee is readily absorbed into expanding industries (IBT J.S. 55).[8] These factors demonstrate that uniform treatment of rail and motor-carrier employees is not required by the Constitution.

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[5] Railway Labor Act, 44 Stat. 577, 45 U.S.C. 151 *et seq.*

[6] Railroad Retirement Act of 1937, 50 Stat. 307, 45 U.S.C. 228a *et seq.*

[7] Railroad Unemployment Insurance Act, 52 Stat. 1094, 45 U.S.C. 351 *et seq.*

[8] Statistics reflecting employment trends reveal that total rail employment has declined 50 percent since 1950, while at the same time total motor freight transportation and storage employment has increased by nearly 55 percent. Interstate Commerce Commission, *79th Annual Report,* 1965, p. 146.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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